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In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BEATY MAE GILLIARD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

WILLIAM KANTER
CARLENE V. MCINTYRE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether Section 402(a)(38) of the Social Security Act, which provides that all parents, brothers and sisters who live together shall constitute a single filing unit for purposes of the Aid To Families With Dependent Children (AFDC) program, is unconstitutional as violative of the Takings Clause, the Due Process Clause or the Equal Protection component of the Fifth Amendment.

PARTIES TO THE PROCEEDING

In addition to those named in the caption, the parties are: Philip J. Kirk, Secretary, North Carolina Department of Human Resources; C. Barry McCarty, Chairman, North Carolina Social Services Commission; and Samuel Odell Davis, Lorraine Gilliard, Thomas Gilliard, Dana Gilliard, Gregory Gilliard, Reginald Gilliard, and Samuel Davis, Jr. Gilliard, minors, by their mother and next friend, and all others similarly situated.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the district court holding the relevant provision of the Social Security Act unconstitutional is reported at 633 F. Supp. 1529 (App., *infra*, 13a-92a). Subsequent decisions and orders of the district court are unreported (App., *infra*, 1a-12a, 98a-105a, 106a-109a).

JURISDICTION

The judgment of the district court (App., *infra*, 93a) was entered on July 14, 1986. The decision of the district court denying motions for reconsidera-

tion was entered on August 25, 1986 (App., *infra*, 106a-109a). A notice of appeal to this Court was filed on July 29, 1986, and an amended notice of appeal was filed on September 16, 1986 (App., *infra*, 94a-97a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> [N]or shall any person be * * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Section 402(a)(38) of the Social Security Act, 42 U.S.C. (Supp. II) 602(a)(38), provides in pertinent part:

> A State plan for aid and services to needy families with children must—
>
> * * * * *
>
> provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination

and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter) * * *.

STATEMENT

A. STATUTORY AND REGULATORY FRAMEWORK

Congress established the Aid to Families with Dependent Children (AFDC) program in 1935. Social Security Act, ch. 531, Tit. IV, §§ 401-406, 49 Stat. 627-629, 42 U.S.C. (& Supp. II) 601 *et seq.* The program is designed to provide financial assistance to families with needy dependent children. See *Heckler* v. *Turner*, No. 83-1097 (Feb. 27, 1985,. A "dependent child" is a needy child who has been deprived of parental care and support by the death, incapacity or "continued absence from the home" of a parent (42 U.S.C. 606(a)).

In order to qualify for AFDC benefits, a family must meet certain standards of financial need, determined by its income and resources. 42 U.S.C. 602(a). The minimum monetary subsistence levels are established by the states (42 U.S.C. (& Supp. II) 602(a)(23)), and the states have " 'broad discretion in determining both the standard of need and the level of benefits.' " *Heckler* v. *Turner*, slip op. 4 n.3 (quoting *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974)). A family is eligible for AFDC benefits if its countable income is less than the standard of need established by the state. The amount of benefits paid to the family is based upon the difference between the family's income and that standard.

Prior to 1984, the statute contained no requirement that all family members residing together be

included in the "filing unit" for AFDC purposes. Prior to 1984, therefore, a family applying for AFDC assistance could have excluded from the filing unit those members with income that, if counted in the eligibility determination, would have reduced the amount of the family's AFDC benefits or would have terminated its eligibility entirely. See I Senate Comm. on Finance, *Deficit Reduction Act of 1984*, S. Prt. 98-169, 98th Cong., 2d Sess. 980 (Comm. Print 1984). Moreover, in anticipation that one of its members was about to receive additional income, a family could have removed that member from the AFDC rolls, thus enabling the remaining family members to continue to qualify for benefits.

In 1984, Congress amended the statute to set forth an explicit requirement that a parent and all siblings who reside with a dependent child be included in the filing unit when a family seeks or receives AFDC benefits. Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, § 2640, 98 Stat. 494, 42 U.S.C. (Supp. II) 602(a)(38). The Senate Finance Committee explained the purpose of this amendment as follows (S. Prt. 98-169, *supra*, at 980):

> *Present Law*
>
> There is no requirement in present law that parents and all siblings be included in the AFDC filing unit. Families applying for assistance may exclude from the filing unit certain family members who have income which might reduce the family benefit. For example, a family might choose to exclude a child who is receiving social security or child support payments, if the payments would reduce the family's benefits by an amount greater than the amount payable on behalf of the child.
>
> * * * * *

Explanation of Provision

> The provision approved by the Committee would require States to include in the filing unit the parents and all dependent minor siblings (except SSI recipients and any stepbrothers and stepsisters) living with a child who applies for or receives AFDC. * * *
>
> This change will end the present practice whereby families exclude members with income in order to maximize family benefits, and will ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole.

The committee estimated that this change would save $455 million during 1984-1987 (*id.* at 981). See 130 Cong. Rec. S4099 (daily ed. Apr. 9, 1984) (remarks of Sen. Dole).

This statutory change reflected Congress's recognition that a family that includes a member with separate income is less needy than a comparable family in which no member has any (or as much) such income. Thus, under the law as amended in 1984, all persons listed in the DEFRA amendment must be included in the filing unit when a family applies for AFDC, and the income received by all such persons must be considered in determining the family's eligibility for benefits, and, if the family is eligible, the level of benefits that it will receive.[1]

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[1] To implement the DEFRA amendment, the Secretary of HHS promulgated the following regulation (45 C.F.R. 206.10(a)(1)(vii)):

> For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also

The effect of the 1984 amendment may be illustrated by a simplified example. Assume a family of four, consisting of three children and one parent, and assume that one of the children had a separate income of $200 per month, representing the family's only income. Prior to the 1984 amendment, the family could have excluded that child from the filing unit. The family would then have constituted a filing unit of three (one parent and two children) with no income, and it would have received the maximum AFDC monthly benefits for a family of that size, perhaps $250. Thus, when the excluded child's separate income was received, the aggregate monthly income of all members of the family would have been $450 ($250 in AFDC benefits plus $200 separate income).

Under the statute as amended in 1984, by contrast, the family, if it chooses to apply for AFDC assistance, must include the income-receiving family member in the filing unit (42 U.S.C. (Supp. II) 602(a)(38)). It is now a filing unit of four (one parent and three children) with a monthly income of $200. If the state-prescribed maximum grant for a family of that size is $300 per month, the monthly AFDC benefits would be $100 ($300 minus $200) which, when added to the child's income, brings the family up to the state's maximum grant level ($300).

In amending the statute in 1984, Congress established a slightly different scheme where the child's separate income is obtained in the form of child-

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include, if living in the same household and otherwise eligible for assistance:

(A) Any natural or adoptive parent, or stepparent (in the case of States with laws of general applicability); and

(B) Any blood-related or adoptive brother or sister.

support payments. The effect of this variation was to mitigate the impact of the new filing-unit provision. Since 1975, the AFDC program has required, as a condition of eligibility, that an applicant assign to the state any right to child-support payments. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(c)(5)(C), 88 Stat. 2359, 42 U.S.C. 602(a)(26)(A); see *Sorenson* v. *Secretary of the Treasury*, No. 84-1686 (Apr. 22, 1986), slip op. 1-2. That assignment provision operated only when a family chose to include in the filing unit the child who received the support payments.[2] Had Congress in 1984 simply added the requirement, without more, that a child with child-support income be included in the filing unit, the joint operation of DEFRA and the preexisting assignment provision would have produced a procedure in which the child-support payments were required to be assigned to the state, with the family receiving a somewhat larger AFDC payment to reflect the larger filing unit. Congress recognized, however, that the child support thus assigned might sometimes be greater than the marginal increase in AFDC benefits thus obtained, resulting in a possible economic disadvantage to the family. To alleviate that potential disadvantage, Congress added a companion provision to the statute in 1984. Pub. L. No. 98-369, § 2640(b)(1), 98 Stat. 1145, 42 U.S.C. (& Supp. II) 657(b)(1). That section provides that the first $50 of any monthly child-support

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[2] This typically occurred when the support payment was smaller than the increase in AFDC benefits that the family would realize by applying as a larger filing unit. It also occurred when the noncustodial parent was delinquent or irregular in making child-support payments and the family concluded that it could maximize its aggregate income by including the child in the filing unit.

payment collected by the state pursuant to the assignment provision is to be paid by the state directly to the child's caretaker relative, and that this $50 is to be disregarded in determining the family's AFDC eligibility and benefits.

The effect of this latter amendment may again be illustrated by an example. Assume the same family of four described in the example above, and assume that the child's $200 monthly income consists entirely of child support. Under the amended statute, that child would be included in the family filing unit for AFDC purposes; the $200 monthly child-support payment would be assigned to the state; the first $50 of child support collected by the state would be remitted to the family; that $50 would be disregarded in determining the family's income for AFDC purposes; and the family would be treated as a filing unit of four with no income, entitling it to $300 monthly benefits. Unlike the family described in our first example, therefore, the family that assigned its child support would have an aggregate monthly income of $350 ($300 in AFDC benefits and the additional $50 remittance from the state).

B. PROCEEDINGS IN THIS CASE

1. This case had its origin in a challenge to the operation of the AFDC program in North Carolina long before DEFRA was enacted. In 1971, the United States District Court for the Western District of North Carolina invalidated a state rule that required child-support income to be considered a resource available to the family when computing the family's eligibility for AFDC benefits; the court held that the rule was inconsistent with the federal statutory scheme then in effect and enjoined the rule's enforcement. *Gilliard* v. *Craig*, 331 F. Supp. 587 (W.D.

N.C. 1971), aff'd, 409 U.S. 807 (1972). Following the enactment of DEFRA and the promulgation of federal and state implementing regulations, appellees here, stating that they were members of the class certified by the district court in 1971, filed a motion for further relief asking the district court to enforce its 1971 injunction. The State of North Carolina filed a third-party complaint against the Secretary, contending that its current rules comply with the federal regulations implementing the DEFRA filing-unit rule and also contending that, if the State were found liable, the United States should be required to share in the payment of any AFDC benefits awarded.

2. On May 7, 1986, the district court issued its decision holding that the DEFRA filing-unit provision is unconstitutional (App., *infra*, 13a-92a). The court first addressed appellees' statutory-construction arguments, rejecting their contention that the Secretary's regulations conflict with the statute as amended in 1984. The court said that the legislative history "clearly shows that the intent of the DEFRA amendment is to measure need by assessing the aggregated resources of all family members [and that] the option of choosing which members of a family may be included in the assistance unit is no longer available to families whose members have different individual sources of income" (*id.* at 48a-49a). The court also rejected appellees' argument that child support was "legally restricted income" which Congress did not intend to be counted in determining a family's eligibility for assistance (*id.* at 50a). "That would be the constitutional approach," the court stated, "but it was not the *congressional* approach" (*ibid.* (emphasis in original)). Finally, the district court found no merit in appellees' contention that, because

North Carolina law permits a mother to spend child support "only on the child for whom the support has been obtained," the law would be violated if child-support income were counted as "a family financial resource" (*id.* at 54a, 56a). The district court concluded that Congress's clear intent to include child support in AFDC calculations preempted state laws to the extent that they treat such income as the exclusive property of the child (*id.* at 52a, 59a-60a).

The court then proceeded to hold the statute unconstitutional (App., *infra*, 61a-92a). First, the court concluded that the requirement that an AFDC applicant assign child-support income to the state constituted a taking of private property without just compensation. The "taking" that the court identified was the child's loss of "the right to enforce the fiduciary obligation that prohibited the mother from spending the money on anyone other than the designated child" (*id.* at 67a).

With respect to appellees' substantive due process claims, the court concluded that it should apply a more rigorous degree of scrutiny than is ordinarily applicable to legislative decisions concerning the allocation of public welfare benefits. In the court's view, appellees' challenge to the DEFRA amendment "addresses a governmental decision to intercept the delivery of *private* property" (App., *infra*, 73a (emphasis in original)). "The impact of [Congress's] action on the child's fundamental associational rights and on a property right," the district court stated, "require[s] a more rigorous examination than [appellants] suggest" (*ibid.*).

Asserting that DEFRA's filing-unit provision strains a mother's ability to keep her family intact and reduces the income of a family receiving AFDC

benefits from "its already meager level," the district court held that the DEFRA amendment unconstitutionally burdens family relationships (App., *infra*, 78a). While acknowledging that the congressional objective of conserving limited fiscal resources is a legitimate one, the court held that "[t]he Constitution's consistent recognition and protection of family associational rights prevent the state and federal governments from using children's unchosen membership in a family that includes AFDC dependent half-sisters and brothers as the justification for the deprivation of property" (*id.* at 89a).

On July 3, 1986, the district court issued a final order enjoining the Secretary from "requiring state defendants mandatorily to include the parent and all children living in the household in the assistance unit and from requiring child support income received from the legally obligated parent of one of the children to be included in determining financial eligibility for the rest of the family members" (App., *infra*, 6a). The court also issued, on the same day, an order in response to the Secretary's motion for clarification of its opinion. In that order the court stated that it "finds the statute unconstitutional because it imposes a financial penalty on children receiving adequate child support" and that "[s]uch a deprivation of property based on a child's unchosen family membership violates due process and equal protection principles, as explained at length in the memorandum of decision" (*id.* at 8a).

On August 25, 1986, the district court denied motions for reconsideration in light of this Court's decision in *Lyng* v. *Castillo*, No. 85-250 (June 27, 1986). In *Castillo*, this Court reversed a district court decision which had held that a provision of the

Food Stamp Act allocating benefits on the basis of single households composed of parents, children or siblings unduly burdened family associational rights and hence violated the equal protection component of the Due Process Clause. The district court below, in denying the motions for reconsideration, stated that *Castillo* did not control the instant litigation because the classification here unduly penalizes persons "who are not free to change their living arrangements to preserve or augment their income" (App., *infra*, 109a).

THE QUESTION PRESENTED IS SUBSTANTIAL

The district court has invalidated and enjoined enforcement of a key provision of the Social Security Act that effectuates Congress's express intent to remedy a flaw in the AFDC eligibility scheme. Faced with the task of allocating finite government funds among a large number of potential recipients, a task made more difficult by an "overwhelming deficit crisis," Congress decided in 1984 to ensure "that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole" (S. Prt. 98-169, *supra*, at 980). If the decision below is allowed to stand, the result would be to thwart Congress's determination that the statutory scheme as amended in 1984 best allocates scarce resources to those most in need.[3]

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[3] The district courts are divided on the question presented in this case. The government has prevailed in the following cases involving challenges to the 1984 AFDC amendments: *Childress* v. *Hill*, No. 85-Z-1459 (D. Colo. Jan. 21, 1986); *Creaton* v. *Heckler*, 625 F. Supp. 26 (C.D. Cal. 1985) (denial of preliminary injunction), No. CV-85-3306-R (May 16,

1. We start on common ground with the district court in one respect. The court correctly discerned Congress's intent to include in the AFDC family filing unit children receiving child-support payments

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1986) (decision on the merits); *Maryland Dep't of Human Resources* v. *United States Dep't of Health & Human Services*, No. M-86-605 (D. Md. Apr. 22, 1986); *Mobbs* v. *Bowen*, No. C-86-245-AAM (E.D. Wash. July 21, 1986); *Oliver* v. *Ledbetter*, 624 F. Supp. 325 (N.D. Ga. 1985); *Sherrod* v. *Hegstrom*, 629 F. Supp. 150 (D. Or. 1985); *Shonkwiler* v. *Heckler*, 628 F. Supp. 1013 (S.D. Ind. 1985) (denial of preliminary injunction), No. IP 85-1612-C (Aug. 11, 1986) (decision on the merits); *Van Berg* v. *Shinpoch*, No. C85-2069C (W.D. Wash. Apr. 18, 1986); *Van Horn* v. *Hegstrom*, No. 85-1768RE (D. Or. Feb. 20, 1986). Only one court, aside from the district court below, has held the DEFRA filing-unit provision unconstitutional. *Lesko* v. *Bowen*, No. 85-C-1600 (W.D. Wis. July 16, 1986) (granting preliminary injunction). The Secretary and the state defendants in that case have noticed an appeal to this Court, and the state filed its jurisdictional statement on September 12, 1986 (No. 86-415). We anticipate that we will file a jurisdictional statement in *Lesko* shortly. Several district courts have invalidated the DEFRA-AFDC amendments on other grounds without addressing the constitutionality of the statute. See *Gorrie* v. *Heckler*, 624 F. Supp. 85 (D. Minn. 1985), appeal pending, No. 85-5394-MN (8th Cir.); *Johnson* v. *Cohen*, No. 84-6277 (E.D. Pa. Jan. 10, 1986), appeal pending, Nos. 86-1101, 86-1107, 86-1149 (3d Cir.); *White Horse* v. *Heckler*, 627 F. Supp. 848 (D.S.D. 1985), appeal pending, Nos. 85-5005, 85-5006SD (8th Cir.). Preliminary injunctions have been granted in favor of plaintiffs on statutory grounds in *Frazier* v. *Pingree*, 612 F. Supp. 345 (M.D. Fla. 1985); *Lee* v. *Pingree*, No. 85-644-Civ-T-13 (M.D. Fla. Feb. 13, 1986); *Gibson* v. *Sallee*, No. 3-85-1283 (M.D. Tenn. Mar. 6, 1986); *Short* v. *Heckler*, No. C85-2248 (W.D. Wash. Jan. 6, 1986). Preliminary injunctions have been denied in *Ardister* v. *Mansour*, 627 F. Supp. 641 (W.D. Mich. 1986); *Rosado* v. *Bowen*, No. H-85-171(JAC) (D. Conn. Apr. 25, 1986).

regardless of their individual need for assistance (App., *infra*, 48a-49a). In ascertaining the need of a dependent child for aid, the statute as amended in 1984 requires the state to include in the AFDC eligibility determination "any brother or sister of such [dependent] child" as long as that brother or sister "is living in the same home as the dependent child" and meets the other conditions set forth in the statute. 42 U.S.C. (Supp. II) 602(a)(38).[4] The statute also clearly provides that "*any income* of or available for such parent, brother, or sister * * * *shall be included in making* [*the eligibility*] *determination.*" 42 U.S.C. (Supp. II) 602(a)(38) (emphasis added).

2. We part company rather vigorously, however, with the district court's conclusion that the mechanism that Congress has chosen for calculating AFDC eligibility and benefits is unconstitutional. It is of course well established that social welfare legislation need withstand only a minimal level of scrutiny in order to survive due process and equal protection challenges. See, *e.g.*, *Atkins* v. *Parker*, No. 83-1660 (June 4, 1985); *Schweiker* v. *Hogan*, 457 U.S. 569 (1982); *Schweiker* v. *Wilson*, 450 U.S. 221 (1981); *Califano* v. *Jobst*, 434 U.S. 47 (1977); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). A classification created by federal welfare legislation will be upheld so long

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[4] Amended Section 602(a)(38) also requires that such brother or sister meet "the conditions * * * in clauses (1) and (2) of [42 U.S.C.] 606a." Those clauses have but two requirements. First, the child must be "deprived of parental support or care." Second, the child must be under the age specified in that provision. As the district court noted (App., *infra*, 49a), a co-resident sibling who receives child support is "deprived of parental support or care" because his or her noncustodial parent is "absen[t] from the home" within the meaning of Section 606(a).

as there is a rational basis for the congressional choice and the classification is not "patently arbitrary." *Califano* v. *Aznavorian*, 439 U.S. 170 (1978); *Flemming* v. *Nestor*, 363 U.S. 603 (1960).

The filing-unit provision adopted by Congress in 1984 is an appropriate means of carrying out the legislative conclusion that families whose members have access to additional sources of income have less need for government assistance than families without access to such sources of income. That conclusion flowed from Congress's legislative findings that family members who live in the same household pool their resources and share their expenses. As this Court noted in *Lyng* v. *Castillo*, *supra*, "close relatives sharing a home—almost by definition—tend to purchase and prepare meals together" (slip op. 7). Congress relied here on the same proposition that this Court found rational in *Castillo*: that family members, in meeting their subsistence needs, share expenses and, therefore, at least indirectly, share their respective incomes.[5] Having reached the con-

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[5] For similar reasons, the district court was incorrect in concluding that DEFRA's filing-unit rule conflicts with state law governing child support. The district court's preemption analysis (App., *infra*, 53a-61a) is therefore misplaced. State law does not preclude the custodial parent from using child-support payments for the child's shelter and food, items that are ordinarily regarded as shared expenses of families that reside together. Accordingly, this case involves no conflict between federal and state laws governing a child's interest in or right to support payments. Rather, the only question presented here concerns Congress's ability to require that AFDC filing units be composed of all members of the family with income that affects the family's need for assistance. The fact that child-support income may under state law be deemed the property of the child on whose behalf it is paid does not mean that Congress cannot, consistently with state law, require that such income be considered when the child's family

clusion that all income received by family members residing in the same household should be considered in determining the family's eligibility for AFDC assistance, Congress implemented budget reduction plans that rationally cut benefits most to those who are, because of their additional sources of income, relatively speaking least needy.[6]

3. The district court also erred in holding (App., *infra*, 61a-70a) that the treatment of child-support payments under the amended statute effected a "taking" of private property in violation of the Fifth

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applies for AFDC. Contrary to the district court's analysis (*id.* at 52a-53a), the DEFRA filing-unit provision does not reorder the manner in which families spend their money, and therefore it does not require that a custodial parent make "available" to the rest of the family child-support income that is exclusively the property of one child.

[6] There is no support for the district court's suggestion that the DEFRA filing-unit provision is unconstitutional on the theory that it infringes upon parental rights to "keep[] their families intact" (App., *infra*, 79a), and discourages fathers from honoring their child-support obligations (*id.* at 79a-85a). This Court recently explained that only those governmental regulations which " 'directly and substantially' " interfere with family-based decisions run afoul of the Due Process Clause. *Castillo*, slip op. 3 (quoting *Zablocki* v. *Redhail*, 434 U.S. 374, 387 & n.12 (1978)). The standard filing-unit provision at issue here, however, does not directly cause any constitutionally cognizable harm to the family unit. That provision, rather, like the similar family-based eligibility scheme upheld in *Castillo*, merely adjusts the eligibility determination to reflect the unexceptional notion that family members who live together tend to share their living expenses. There is no constitutional impediment to Congress's conclusion that eligibility for AFDC, which is a "*family* grant" (*Dandridge* v. *Williams*, 397 U.S. 471, 477 (1970) (emphasis in original)), should reflect this fact of family life.

Amendment. In reaching that conclusion, the district court focused, not on Congress's redefinition of the filing unit in 1984, but on an entirely separate provision enacted in 1975. That provision requires that any applicant for AFDC benefits who has any right to support, either "in his own behalf or in behalf of any other family member for whom [he] is applying for or receiving aid," must assign those rights to the state "as a condition of eligibility" (42 U.S.C. (& Supp. II) 602(a)(26)(A)). See *Sorenson* v. *Secretary of the Treasury*, slip op. 1-2. The district court did not suggest, and it could not credibly be maintained, that this assignment provision effected an unconstitutional "taking" of child-support payments upon its enactment in 1975. The AFDC program has always been a voluntary one, conferring sizable benefits on those who choose to participate, and it is clear that Congress may attach reasonable conditions to participation in such programs. *Cf. Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1007 (1984) ("[A]s long as [the applicant] is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking").

But the assignment provision, which was constitutional when first enacted, cannot be thought to have suddenly effected a "taking" of private property in 1984, when Congress amended the law to standardize the composition of the AFDC filing unit. After that amendment, as before it, the AFDC program remains a voluntary one, conferring sizable benefits on those who choose to participate. The only relevant change effected by the 1984 amendment is that those who

choose to participate must now include in the filing unit all members of the family who live together and hence share their resources and expenses. This new filing-unit provision, like the preexisting assignment provision, is plainly a condition of AFDC eligibility that is "rationally related" to the legitimate legislative purpose of restricting the availability of limited public welfare funds to those who are most in need.

In reaching its incorrect result, the district court misconstrued the nature of the government interest and paid scant attention to the benefits that the statutory scheme confers on AFDC families. The court narrowly viewed the government's interest as "budgetary savings" (App., *infra*, 86a; see *id.* at 89a). While that plainly legitimate objective is entitled to greater deference than the district court gave it (see *Bowen* v. *Owens*, No. 84-1905 (May 19, 1986), slip op. 7-8), Congress in fact sought to achieve a broader objective: the optimal allocation of scarce resources to those most in need of government aid. In seeking to promote that clearly proper purpose, Congress started from the unremarkable premise that families whose members have larger aggregate incomes are less needy than families whose members have smaller aggregate incomes.

Congress then crafted a plan that reasonably accommodates the competing values in this complex area of social policy. Under the statute as amended in 1984, the custodial parent, acting as fiduciary for his or her minor children, retains the option to decide whether it is in the best interest of the children, individually and collectively, to assign to the state the child-support payments due one or more children and apply for AFDC benefits, or, instead, to continue to receive child-support payments and forgo AFDC.

That decision is the same decision that the custodial parent, acting as fiduciary for his or her minor children, has had to make at all times since the assignment provision was enacted in 1975.

If the custodial parent decides to apply for AFDC benefits, that decision confers significant advantages on all members of the family, including any children who may be entitled to support payments. That decision removes from the shoulders of the child and the custodial parent most of the consequences of child-support delinquency.[7] After the child-support rights are assigned to the state, the family receives an AFDC grant that reflects the needs of the child regardless of the state's ability to collect from the noncustodial parent. Thus, the child's income (and, derivatively, the family's) is not subject to wide monthly fluctuations depending on whether support payments are made on time and in full.[8] The legislative scheme also removes from the AFDC recipients most of the burden of pursuing non-custodial parents who fail to satisfy their support obligations. That

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[7] As of early 1984, 8.7 million women headed families with minor children whose fathers were not living in the household; of those women who had been awarded child support, 25% received no payments at all, and another 25% received less than the full payments to which they were entitled. Bureau of the Census, U.S. Dep't of Commerce, *Child Support and Alimony: 1983*, at 1 (July 1985).

[8] Only the $50 disregard (see pages 6-8, *supra*) is dependent upon the state's ability to collect support payments from the noncustodial parent. Even in months when the noncustodial parent makes no payment, therefore, the family's income will not fall below the state's maximum payment level for a family of that size and circumstance. And when support payments are actually made by the noncustodial parent, the child receives the $50 increment on top of the family's full AFDC grant.

task falls to the state (see 42 U.S.C. (Supp. II) 666), which has at its disposal the enhanced enforcement mechanisms enacted by Congress contemporaneously with DEFRA. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 *et seq.* An additional benefit flowing from the DEFRA amendments is that children newly included in the AFDC filing unit are automatically entitled to receive free medical care under the Medicaid program (see 42 U.S.C. (& Supp. II) 1396a(a)(10)(A)(i)(I)). Finally, as we have noted (pages 6-8, *supra*), Congress attempted to mitigate any economic disadvantage that the new filing-unit rule might work on some families by providing that the first $50 of monthly child support collected by the state be paid directly to the child's caretaker relative, which $50 is to be disregarded in determining the family's AFDC eligibility. Pub. L. No. 98-369, § 2640(b)(1), 42 U.S.C. (Supp. II) 657(b)(1).

The "administration of public welfare assistance * * * involves the most basic economic needs of impoverished human beings" (*Dandridge* v. *Williams*, 397 U.S. at 485). Any adjustment to the benefit scheme that results in a lowering of benefit levels undoubtedly causes hardship to certain needy persons. But such hardship, if it is the consequence of rational judgments by the legislature in pursuit of legitimate governmental objectives, does not rise to the level of a constitutional deprivation. Any requests for further adjustments to the benefit scheme are properly addressed to Congress and not the courts. See *Schweiker* v. *Hogan*, 457 U.S. 569, 590-592 (1982); *Schweiker* v. *Wilson*, 450 U.S. 221, 238 (1981).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

WILLIAM KANTER
CARLENE V. MCINTYRE
Attorneys

SEPTEMBER 1986

APPENDIX A

IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD; LORETTA GILLIARD; THOMAS GILLIARD; DANA GILLIARD; GREGORY GILLIARD; REGINALD GILLIARD; and SAMUEL DAVIS JR. GILLIARD, minors, by their mother and next friend, BEATY MAE GILLIARD, on behalf of themselves and all others similarly situated, PLAINTIFFS

-vs-

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY MCCARTY, Chairman, North Carolina Social Services Commission, in his official capacity, DEFENDANTS AND THIRD-PARTY PLAINTIFFS

-vs-

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services, THIRD-PARTY DEFENDANT

[Filed July 3, 1986]

FINAL ORDER

A hearing on plaintiffs' motion for further relief and state defendants' motion for relief from judgment was held on September 18, 1985. After full consideration of the contentions of all parties, this court issued a memorandum of decision on May 7, 1986, finding plaintiffs entitled to full relief. Pursuant to that memorandum of decision, the court now enters the following order:

Class Definition

1. For purposes of relief, the class is defined as all those persons who have been or may be subject to reduction, termination or denial of AFDC benefits based upon the unconstitutional or illegal claim of credit by administering agencies for child support income available to some, but not all, of the family group. In addition, this class includes all those persons who were unlawfully included in the AFDC standard filing unit and involuntarily required to assign their child support rights to the state, thereby losing the use and benefit of some or all of that child support.

Prospective Relief

2. State defendants, their officers, agents, servants, employees and those persons acting under or in concert or participation with them, are hereby restrained and enjoined from enforcing any and all statutes, regulations, rules or policies that require an AFDC applicant or recipient to include in the AFDC application all children living with the applicant or recipient when that would require the inclusion of children who receive adequate child support and would not otherwise be included in the AFDC unit. The

state defendants are also restrained and enjoined from counting the income of children not voluntarily included in an assistance application as income available to the AFDC unit.

3. State defendants are likewise enjoined from enforcing any statutes, regulations, rules or policies that require an AFDC applicant or recipient to assign to the state a child's rights to receive child support unless the applicant wishes to obtain AFDC for that child.

Retroactive Relief

4. State defendants are ordered to pay to the members of the class the AFDC benefits they would have received but for the unlawful reduction, termination or denial from October, 1984, to the present. State defendants will also return all child support members of the class would have received but for the unlawful inclusion of these children in the AFDC standard filing unit and subsequent assignment of their child support to the state, from October, 1984, to the present.

5. State defendants are required, within sixty (60) days of the date of this order, to identify all members of the plaintiff class as defined in paragraph 1 of this order.

6. Upon identification of members of the class, the state defendants shall immediately file with the court a list of all persons identified, including each person's name and address. This list will include all persons receiving AFDC for whom a child support obligation exists. State defendants shall provide a copy of this list to counsel for the plaintiffs.

7. Within thirty (30) days of the filing of the list described herein, state defendants shall make a retroactive payment of all amounts due to the iden-

tified class members who have remained on AFDC and for whom defendants have sufficient information to calculate the appropriate payment. At the time this payment is authorized, defendants shall send a notice to the recipient explaining the nature of and reason for the payment. The notice shall explain to the recipient that children receiving child support may be excluded from the AFDC grant, and that to exercise this option the recipient should contact his or her case worker. This notice shall be drafted in consultation with plaintiffs' counsel.

8. At the time of filing the list described in paragraph 6, the state defendants shall send a separate notice to all persons on the list who are not affected by paragraph 7, that is, those persons whose AFDC was denied or terminated as a result of the standard filing unit and for whom insufficient information is known to calculate the appropriate retroactive benefit. This notice, which shall be drafted in consultation with plaintiffs' counsel, shall explain the court's decision and notify the recipients that they may be entitled to a retroactive benefit. The recipients shall also be told that they may reapply for AFDC benefits for any of their children, without the requirement that children receiving child support be included. This notice shall urge the recipients to contact the county Department of Social Services as soon as possible to learn what information is required to calculate the retroactive benefit. When contacted by the recipient, the county shall immediately give notice to the recipient of the specific items of verification needed to calculate the retroactive benefit. The recipient shall have ninety (90) days from the receipt of such notice to provide the required information.

Ninety days after the initial notice is mailed, state defendants shall send a second notice to those per-

sons who have not responded, or who have failed to provide all necessary verifications. This notice, which shall be drafted in consultation with plaintiffs' counsel, shall allow recipients an additional ninety days to provide necessary information upon a showing of good cause.

9. Within thirty (30) days of receipt by the county Department of Social Services of all information necessary to calculate a recipient's retroactive benefit, the state defendants shall pay the recipient. In cases of unusual complexity, this deadline may be extended to sixty (60) days. If the defendants determine that no payment is due, they shall send a notice to this effect to the recipient within thirty (30) days of the receipt of all required information.

10. In addition to the notice, signs shall be printed and displayed and public service announcements made to insure that all persons affected by this order have the opportunity to make a claim for retroactive benefits. State defendants shall consult with plaintiffs' counsel in the drafting and publication of these signs and public service announcements.

11. At the time each payment is authorized, state defendants shall send a notice explaining why the payment is being made, the months for which payment is made and the amount of payment for each month. Reasons for non-eligibility for payment will also be explained. The notice will inform recipients that there is a right to appeal the decision of the county. This appeal right shall be governed by the procedures set out in Section 2640 of the North Carolina AFDC manual. The notice shall also specify that free legal advice is available and the toll free CARELINE number will be provided to assist in obtaining this advice.

12. The state defendants are enjoined from counting any money received pursuant to this order as income or resources for the purposes of determining AFDC or Medicaid eligibility.

13. The third-party defendants are enjoined from requiring state defendants mandatorily to include the parent and all children living in the household in the assistance unit and from requiring child support income received from the legally obligated parent of one of the children to be included in determining financial eligibility for the rest of the family members.

14. Third-party defendants are required to participate financially by paying the federal share of any payments required of state defendants as a result of this decision.

15. The third-party defendants are enjoined from requiring state defendants to count any money received pursuant to this order as income or resources for purposes of determining AFDC or Medicaid eligibility.

16. The plaintiffs' motion for further relief is hereby GRANTED and the plaintiffs are entitled to costs and attorney fees.

17. The state defendants' motion for relief from judgment is hereby DENIED.

This 30 day of June, 1986.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

APPENDIX B

IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD; LORETTA GILLIARD; THOMAS GILLIARD; DANA GILLIARD; GREGORY GILLIARD; REGINALD GILLIARD; and SAMUEL DAVIS JR. GILLIARD, minors, by their mother and next friend, BEATY MAE GILLIARD, on behalf of themselves and all others similarly situated, PLAINTIFFS

-vs-

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY MCCARTY, Chairman, North Carolina Social Services Commission, in his official capacity, DEFENDANTS AND THIRD-PARTY PLAINTIFFS

-vs-

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services, THIRD-PARTY DEFENDANT

[Filed July 3, 1986]

ORDER

The federal third-party defendant has filed a motion for clarification of this court's memorandum of decision in this case. The motion seeks a clarification of the treatment of child support payments in the AFDC program and of the court's holding on the constitutionality of the federal statute. The motion is GRANTED.

As the third-party defendant noted in its motion, this court has confronted the constitutional question posed by the federal statute, 42 U.S.C. § 602(a)(38), part of the 1984 Deficit Reduction Act. The court finds the statute unconstitutional because it imposes a financial penalty on children receiving adequate child support while living in families composed of their mothers and their AFDC dependent half-brothers and half-sisters. Such a deprivation of property based on a child's unchosen family membership violates due process and equal protection principles, as explained at length in the memorandum of decision. The state regulations can no longer be implemented because they carry out the constitutionally offensive prescription of the federal statute.

In regard to the treatment of child support under the AFDC program, the court acknowledges that when a child receiving child support is *voluntarily* included in an AFDC grant application, the child's income is taken into consideration in calculating need and fixing the amount of assistance. AFDC recipients are required to assign the child's child support rights to the state as a condition of receiving AFDC. *See* 42 U.S.C. § 602(a)(26). This court does not address and has not been asked to address the propriety of counting a *voluntarily* included child's child

support income as a family financial resource for purposes of calculating the grant.

What plaintiff/movants asked this court to consider was the loss of income experienced by children in families in which adequately supported children have been *required* to become part of the AFDC filing unit so that their mothers and unsupported or inadequately supported half-siblings can remain eligible for AFDC benefits under 42 U.S.C. § 602(a)(38). The third-party defendant correctly notes that "the change which DEFRA wrought" is "to mandate the inclusion of all co-resident parents and siblings, including child support recipients, in any filing unit." FEDERAL THIRD-PARTY DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLARIFICATION OF MEMORANDUM OF DECISION, p. 4. It is the economic deprivation such inclusion precipitates that is the constitutionally cognizable injury suffered by the involuntarily included children who were previously receiving adequate child support. Once in the unit, such a previously excluded child no longer receives the full amount of child support paid by his or her father. The child receives only the child support "disregard" and a fraction of the family's AFDC grant. This combined amount represents a significant loss of income for the adequately supported child. The unsupported child who is totally dependent on AFDC also loses income because he or she will now have access to a smaller portion of thhe AFDC grant.

The court is puzzled by the third-party defendant's inability to comprehend the economic consequences of the SFU regulations. The court's understanding of how the DEFRA inspired SFU system works draws on the affidavits of the plaintiff/movants, such as the

Miles affidavit, reprinted, in pertinent part, at pp. 15-16 of the memorandum of decision. The Miles affidavit is described by the third-party defendants as "the most accurate example of the implementation of DEFRA." Federal third-party defendant's MEMORANDUM OF LAW, *supra*, p. 5.

Ms. Joyce Miles has five children. Her two youngest children, Johnetta and Kisha, receive no support from their father. Her middle child, Larry Miles, Jr., is entitled, under a voluntary support agreement and order signed by his father, Larry Miles, on July 18, 1984, to receive $108 a month in support and $22 a month toward Mr. Miles' accrued support arrearage, which stood at $4,803.00 as of October 31, 1983. While Larry Miles, Jr., was entitled to such support, Ms. Miles does not report in her affidavit that such money was ever received after the support agreement was filed. Ms. Miles did not report receiving a $50.00 disregard for Larry, Jr., when he was receiving AFDC as part of the original four-person unit. This gives reason to doubt that Larry, Jr.'s father actually abided by the support agreement and may explain Ms. Miles' decision to include Larry, Jr., in the original filing unit. Ms. Miles voluntarily included the three youngest children in her AFDC filing unit and assigned Larry, Jr.'s child support rights to the state. Ms. Miles then received $244 a month in benefits for the four-person filing unit. At the same time, Ms. Miles' two oldest children, DeAngela and Felicia, received $189 a month in child support from their father. In October, 1984, the Wake County Department of Social Services informed Ms. Miles that she would have to add DeAngela and Felicia to the filing unit and assign their child support rights to the state *if she wanted her other three children to remain on*

AFDC. Ms. Miles reluctantly agreed to add the two adequately supported children to the AFDC unit and assigned the girls' child support rights to the state. Ms. Miles then received no money from the girls' father, his support payments going directly to the state. Her monthly AFDC grant was raised to $288 a month for her family of six. Ms. Miles also received the $50 monthly child support disregard for the two oldest girls.

Before the SFU regulations went into effect, Ms. Miles had $244 a month to meet her needs and the needs of the three youngest children. She also had $189 a month to meet the needs of her oldest daughters. After October, 1984, Ms. Miles had only $288 a month in AFDC benefits for the whole family plus the $50 disregard for the two oldest girls. Before the SFU/DEFRA plan went into effect, DeAngela and Felicia shared $189, giving each a monthly income of $94.50. After October, 1984, these children obviously received less income. Plaintiffs/movants credibly hypothesized that the mother would divide the AFDC money equally among the family members, which would give DeAngela and Felicia a combined income of $146, or $48 each in AFDC plus the $50 disregard.

Contrary to the third-party defendant's misinterpretation of the court's discussion of the economic consequences of the SFU/DEFRA requirements in the memorandum of decision, the children's income reduction was not attributed to any simple subtraction of the amount of child support from the AFDC grant amount for the statutorily enlarged unit. Rather, the court recognized that the involuntarily assigned child support was considered family income and that amount was then compared to the need

standard for a unit of the mandatorily expanded size in order to determine the unit's eligibility for assistance. If the amount of child support which some but not all of the children in the newly defined unit received was below the need standard for a family with the greater number of members, the family was eligible and the supported children would have to assign their child support rights to the state. These children would then receive the $50 disregard and a fraction of the grant. Every child in the unit, those previously on AFDC and those previously supported by their fathers, would then experience a reduction in the amount of income to which they would have access.

The court hopes the preceding explanations illuminate those portions of its previous memorandum of decision that the federal third-party defendants found unclear.

IT IS SO ORDERED, this 30 day of June, 1986.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

APPENDIX C

IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD; LORETTA GILLIARD; THOMAS GILLIARD; DANA GILLIARD; GREGORY GILLIARD; REGINALD GILLIARD; and SAMUEL DAVIS JR. GILLIARD, minors, by their mother and next friend, BEATY MAE GILLIARD, on behalf of themselves and all others similarly situated, PLAINTIFFS

-vs-

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY MCCARTY, Chairman, North Carolina Social Services Commission, in his official capacity, DEFENDANTS AND THIRD-PARTY PLAINTIFFS

-vs-

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services, THIRD-PARTY DEFENDANT

[Filed May 7, 1986]

MEMORANDUM OF DECISION

Before James B. McMillan, District Judge

I. SUMMARY OF DECISION

Plaintiffs are children of low income mothers. They bring this suit through their mother and next friend, on behalf of themselves and similarly situated persons. Not all the children of each mother have the same father. Some of the children are "needy," and have been receiving AFDC (Aid to Families with Dependent Children) payments. Some of the children are not "needy" because their absent fathers are making adequate child support payments to the mother.

The state defendants, acting under a rational interpretation of pertinent recent federal statutes and regulations, are "deeming" the support payments from absent fathers to be income available to all the dependent children in the house. Defendants are cutting off or reducing AFDC payments accordingly, with tragic results shown by the evidence.

This is an unlawful "taking" of the child's income from an absent father. It also unlawfully deprives the other children in the family of AFDC benefits by destroying or reducing their entitlement because one of the mother's children who has income of his or her own exercises his or her right to live in the mother's family unit.

Regardless of whether federal pre-emption in a technical sense has occurred, the federal scheme has,

in fact, over-powered state family law, and has undermined traditional understandings of family values and duties.

Plaintiffs seek an end to the "deeming" practice. They are entitled to relief.

II. CASE HISTORY

This case has been here before. In *Gilliard v. Craig*, 331 F. Supp. 587 (W.D.N.C. 1971) (three judge court), this court enjoined the state defendants from reducing or withholding "the payment of AFDC [Aid to Families with Dependent Children] benefits . . . because of the presumed availability to an AFDC family of [child] support payments which belong to one or more but not all members of that family." *Id.* at 593-94. That decision was appealed to the Supreme Court and was affirmed. 409 U.S. 807 (1972), *reh. den., Craig v. Gilliard*, 409 U.S. 1118 (1973). The 1971 injunction remains in effect because it has not been stayed, vacated, withdrawn or reversed. *Walter v. City of Birmingham*, 388 U.S. 307, 313-14 (1967); *United States v. United Mine Workers of America*, 330 U.S. 258, 293-14 (1947); *Wright v. Jackson*, 522 F.2d 955, 958 (4th Cir. 1975). Consequently, the state defendants remain subject to the commands of the original injunction pending modification or reversal. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 439-40 (1976).

The 1971 class of plaintiffs was

> "persons who have been or may be subject to a reduction of AFDC (Aid to Families with Dependent Children) benefits based upon unconstitutional or illegal claim of credit by administer-

ing agencies for outside income and other resources available to some but not all of a family group."

Gilliard v. Craig, supra, at 588.

The plaintiffs (movants) are members of the same class that was granted relief in 1971. They have filed a motion for further relief, seeking the same sort of relief that was ordered in 1971.

III. THE PRESENT CONTROVERSY; THE TEXT OF THE CHALLENGED NEW STATUTE AND REGULATIONS

On October 10, 1984, the state defendants put into effect a set of new regulations ("Standard Filing Unit" or "SFU" regulations) reading, in pertinent part, as follows:

Standard Filing Unit

A. The parent and all minor children who are brothers and sisters, including half-brothers and sisters, and who are living together *must be* included in the same assistance unit unless:

1. The parent or child is an SSI recipient, or

2. The parent or child does not meet all eligibility factors with the exception of income and reserve. Do not exclude a parent or child because of the amount of income or reserve he has.

Section 2360 III A, State 1985 AFDC Manual (emphasis added) [attached to Plaintiff's Motion For Further Relief].

Implementation of the "Standard Filing Unit" (SFU) regulations triggers the operation of two additional regulatory requirements. According to Section 2350 II of the North Carolina AFDC Manual, the income of all members of the assistance unit is counted as available to the whole unit. Section 2365 II requires that the caretaker of a child in an AFDC filing unit assign to the state any rights to support owed or paid on his or her behalf or on behalf of other family members for whom assistance is requested. Thus, once a child receiving child support income becomes a member of the filing unit as is required by the SFU regulations, the state gains access to that child's income for purposes of reducing the family assistance budget and the state expenditure to the family.

Plaintiffs allege that the new regulations violate the original injunction of this court and the Social Security Act, and wrongfully deprive them of previously available AFDC benefits.

The state asserts that it promulgated and enforced the "Standard Filing Unit" (SFU) regulation in obedience to and in implementation of 42 U.S.C. § 602(a)(38) (Supp. II 1984) [part of "DEFRA," the 1984 federal Deficit Reduction Act]. That section states that a state AFDC plan "*must*":

> "(38) provide that in making the determination under paragraph (7) with respect to a *dependent* child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—
>
> "(A) any parent of such child, and
>
> "(B) any brother or sister of such child, if such brother or sister meets the condi-

> tions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any *income of or available for* such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter). . . ." [emphasis added.]

Section 606(a), referred to in the preceding quotation, defines "dependent child":

> "(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home (other than absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States), or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or in the equivalent level of vocational or technical training), if, before he attains age nineteen, he may reasonably be expected to complete the program of such secondary school (or such training); . . . ."

Paragraph 7 of Section 602 describes the determination of need by the state agency and provides, in relevant part, that such a state plan *must*

> "(7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency—
>
> > "(A) *shall*, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid; . . . ." [Emphasis added.]

Paragraph 8(A) then requires that the state agency, in making the determination of need for an applicant family:

> "(vi) shall *disregard* the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title; . . . ." [Emphasis added.]

(These $50.00 items are referred to as "income disregards" or "disregards.")

The statutory modification worked by Section 602 (a)(38) was implemented and explained by regulations from the Department of Health and Human

Services. Those regulations, 45 C.F.R. § 206.10 (a)(1)(vii) (1985), provide:

> "(vii) For AFDC only, in order for the family to be eligible, an application with respect to a dependent child *must* also include, if living in the same household and otherwise eligible for assistance;
>
> > "(A) Any natural or adoptive parent, or stepparent (in the case of States with laws of general applicability); and
> >
> > "(B) Any blood-related or adoptive brother or sister." [Emphasis added.]

After pointing to these federal instructions, the state asserts that training sessions and discussions with officials from the Department of Health and Human Services in Atlanta, Georgia, and Washington, D.C., have confirmed the state's belief that its action was required by the federal legislation. *See* Affidavit of Kay Fields, Chief, Assistance Payments Section, Division of Social Services, North Carolina Department of Human Resources, p. 2. The state defendants have therefore filed a third-party complaint against the Secretary, seeking contribution from the federal government if the court finds the state has acted improperly and orders the payment of additional benefits.

IV. HOW PLAINTIFFS ARE BEING INJURED BY THE NEW STATUTE AND REGULATIONS

After the state SFU regulations went into effect in October, 1984, the state sent out letters to AFDC recipients who had children in their households who had not been included in the filing unit. These letters stated:

"Prior to October 1, 1984, family members who lived together were not required to apply for AFDC benefits for everyone. A parent could choose to include or exclude himself or herself and any of the children.

"However, the District Reduction Act of 1984, Public Law 98-369, passed by Congress, requires a change in this rule effective October 1, 1948. Section 402(a)(38) of the Act and Sections 2200 and 2360 of the AFDC Manual state that a parent and all brothers and sisters, including half brothers and sisters, who are living in the same household must apply for AFDC with certain exceptions. Any income or assets of the parent and the children are counted in determining eligibility for the family.

"Our record shows that your family is probably affected by the change in federal law. Therefore, you must contact your worker by _____ to
Date
apply for everyone who is required to be in the payment. If you do not contact your worker by this date, your AFDC and Medicaid will be stopped."

Upon contacting their local welfare office, recipients like the plaintiffs were informed that they had to include all children in the filing unit and the child support income received by previously excluded children would now be deducted from the payment amount of a recalculated grant for the new larger AFDC unit. The mother or caretaker would receive only a $50 "disregard" from the child support paid to her on behalf of a previously excluded child. The mother or caretaker was required to sign a form en-

titled "Assignment of Rights to Support," which authorized the payment of a court ordered support amount for the newly included child[ren] directly to the North Carolina Department of Human Resources. Any support paid directly to the mother or caretaker had to be reported to the county department of social services and that amount, less the $50 "disregard," would then be counted as income when the AFDC grant was calculated.

State defendants estimate that enforcement of the SFU regulations would result in "termination or reduction of benefits to about 11.3% of AFDC cases in North Carolina. . . . 7,730 cases would be adversely affected, with an annual loss of benefits ranging between $3.0 and $4.7 million annually." *See* Division of Social Services, Planning and Information Section, August 22, 1984 Memorandum, which is Attachment 1 to Memorandum of Law in Support of Plaintiffs' Motion for Further Relief.

The affidavits submitted by the plaintiffs demonstrate how these federal and state directives have been implemneted in North Carolina and how the interlocking state and federal plans have affected the income and lives of families like those of the plaintiffs:

1) Diane Thomas has two children, Crystal, age 9, and Sherrod, age 7. Ms. Thomas, age 32, has been unable to find gainful employment although she looks constantly for work. She states:

> "4. James Edward Shaw is the father of Crystal. By virtue of a Wake County Court Order, 78 CVD 5056, Mr. Shaw is required to pay $20 a week toward Crystal's support. He almost never complies with the

Order, however, and Crystal has been on public assistance for her whole life.

"5. John Pennington is the father of Sherrod. Although there is no civil court order requiring him to do so, Mr. Pennington has regularly paid $200 a month in child support for Sherrod.

"6. Prior to October, 1984, I received an AFDC grant for myself and my daughter Crystal in the amount of $194.

"7. On October 15, 1984, I received a letter notifying me that if I did not reapply for AFDC and include my son Sherrod in the application, the AFDC for Crystal would be terminated.

"8. I did not reapply for AFDC and my assistance was terminated. The reason I did not reapply is that Sherrod's father had on an earlier occasion threatened to harm me physically if I put his son on welfare. He also threatened to attempt to obtain custody of Sherrod.

"9. I asked for a fair hearing to challenge the termination of AFDC. The state hearing officer upheld the decision of the county to terminate my AFDC."

After the hearing mentioned by Ms. Thomas, the hearing officer filed a report in which he noted:

"On October 15, 1984 the county agency notified appellant by letter that her non-assistance child must be added to the budget unit because of a change in regulations. Appellant did not wish

to include this child in the assistance grant and requested a local hearing on October 18, 1984 to appeal this action. A hearing in the matter was held on October 26, 1984 and on that same date a decision was rendered affirming the county's requirement to include this child in the grant. Appellant did not apply for assistance for this child, and her grant was terminated on October 29, 1984 effective November 30, 1984."

The hearing officer also found as facts the following:

"Appellant's son and daughter have different fathers. . . . The father of the male child pays court ordered child support of $200 per month. These payments are made regularly and are routed through the clerk of court's office.

"The Wake County Department of Social Services informed the appellant on October 18, 1984 that new federal regulations required that the male child be included in the Aid to Families with Dependent Children grant and that if application for the child were not made, the grant would be terminated. Appellant did not apply for her son, and her assistance was terminated effective November 30, 1984.

"Appellant contends that her son's needs are met by his support payments and that he does not require assistance. She further contends that she is required by law to use her son's support money solely for his support and maintenance. The son's father has expressed very negative feelings about having his child receive public assistance when he is providing adequate support for the child."

Despite Ms. Thomas' objections, the hearing officer upheld the termination. He found that the county had correctly implemented the SFU regulations, which he found to be consistent with the governing federal regulation, 45 C.F.R. § 206.10(a)(1)(vii)(B) (1984).

Ms. Thomas' May 2, 1985, affidavit continues:

"10. Because I had no money with which to support Crystal, I finally reapplied for benefits in February, 1985. I included Sherrod on the application as I was required to do, and signed an assignment of Sherrod's support rights to the state.

"11. As of April 11, 1985, John Pennington began to withhold the child's support for Sherrod. He informed me that as long as I was going to use Sherrod's support money to keep up my daughter Crystal, he would continue to withhold the support.

"12. Because I was receiving $200 a month for Sherrod, my AFDC grant was reduced to $73 a month. I could not support Crystal on this amount, so I was forced to use some of Sherrod's support to meet Crystal's needs.

"13. Since my AFDC was terminated in November, 1984, I have been unable to purchase clothing and other necessary items for my children. Our phone service was disconnected in December because I could not pay the bill. I currently have overdue accounts for lights and gas.

"14. Because I have been unable to support both children, members of my family have been providing some assistance. They have their own families and obligations, however, and cannot continue supporting me on an indefinite basis."

By supplemental affidavit, dated September 16, 1985, Ms. Thomas further described her situation:

"1. I have received no direct child support from John Pennington, the father of my son Sherrod, since April 11, 1985.

"2. I was informed by my worker in the Wake County IV-D Unit that she had a meeting with John Pennington about support for Sherrod. On May 22, 1985, John Pennington signed a Voluntary Support Agreement and Order in Wake County 85 CVD 3433. This Agreement requires him to pay child support of $87 month, beginning 7/1/85.

"3. As far as I know, John Pennington did pay the support due for July, because I received a $50 disregard check at the end of August.

"4. Since April, 1985 when Mr. Pennington stopped paying support voluntarily, he has not visited Sherrod. Prior to that time, he visited Sherrod on a regular basis, generally taking his son with him to his home in Durham every other weekend.

"5. Mr. Pennington is extremely opposed to his son being on welfare benefits, and has told me that he stopped seeing his son because I now receive AFDC for Sherrod.

"6. Sherrod is very upset that his father no longer visits him. He frequently asks me why

his daddy does not come to see him anymore. Since the time his father has stopped visitation, Sherrod has begun to wet his bed on a frequent basis. Also since the visitation stopped, Sherrod has become much more disruptive, especially in school. Furthermore, his performance in school seems to have declined.

"7. It is my opinion that the lack of visitation with his father has severely affected Sherrod, causing the bedwetting, disruptive behavior and poor school performance. I cannot think of any other aspects of Sherrod's life which have changed or might have caused these behavioral problems."

2) Mary Medlin is the 30-year-old mother of four children, Anthony Medlin, age 14; Roderick Medlin, age 13; Karen Medlin, age 10, and Jermaine Medlin, age 1. Unable to find a full- or part-time job, Ms. Medlin has no earned income. Ms. Medlin states:

"4. John Sanders is the father of Anthony Medlin and Roderick Medlin. His paternity has never been legally established and he has never supported Anthony or Roderick.

"5. Bobby Harrington is the father of Karen Medlin. On January 4, 1980, he signed a Voluntary Support Agreement in Wake County 80 CVD 0053, agreeing to pay $39 a week. During early 1984, he regularly paid about $320 every three months. On August 20, 1984, the court ordered that he pay $200 a month, with $40 a month assigned to arrearages which had built up and $160 a month to current support. He

began paying $200 a month in September, 1984.

"6. James Richardson is the father of Jermaine. Since Jermaine was born, Mr. Richardson has provided direct support to his son, purchasing clothing and diapers, contributing to my household bills and payme $50 cash as child support. A criminal action for support in Wake County, 85 CR 10961 is currently pending against him, because he has refused to sign a voluntary support agreement.

"7. Prior to October, 1984, I received AFDC for myself and my two older children, in the amount of $223.

"8. After October 1, 1984, I was informed by the Wake County Department of Social Services that my AFDC grant would be terminated unless I added Karen and Jermaine to the application.

"9. Although I did not want to put Karen or Jermaine on AFDC, I did apply for them because it was the only way I could receive any income for myself and my other two children.

"10. After I applied with everyone on the aplication, my whole grant was terminated. The Department of Social Services informed me that because I received $200 in child support for Karen and $50 in child support for Jermaine, my whole family was ineligible.

"11. When I added the two younger children to the AFDC application, I was required to sign an Assignment of Rights to Support form (DSS-1201) on their behalf. This assigned their support to the North Carolina Department of Human Resources.

"12. Because both Bobby Harrington (Karen's father) and I objected to the state taking Karen's child support money, *I agreed to relinquish custody of Karen to her father.* She is, therefore, no longer on my AFDC grant. I signed a Consent Agreement allowing him to suspend his support payments. [Emphasis added.]

"13. After I let Karen go live with her father, I re-applied for AFDC for Anthony, Roderick and Jermaine. My current grant amount is $215 per month. This is the grant for four persons—$244—reduced by $29 per month because Anthony is temporarily out of the home. I also receive $50 per month for Jermaine's support from James Richardson, which I am allowed to keep because of the '$50 disregard.' "

James Richardson, father of Jermaine, has filed an affidavit, which states:

"2. Since the time Jermaine was born, I have been involved in his care and support. I have provided clothing, food and diapers for Jermaine, and have paid some of the household bills for Jermaine's mother, Mary Medlin. I have occasionally brought gifts for some of Mary Medlin's other children.

"3. After Mary Medlin applied for AFDC for her other children, she told me that Jermaine would have to be included in the AFDC application. Because I was taking care of him, I did not think he should be on public assistance and objected to this. She said that if Jermaine were not placed on AFDC, she would lose her AFDC for all her other children. Upon learning that, I reluctantly consented to having Jermaine placed on the AFDC grant.

"4. *Shortly after Jermaine was placed on the AFDC grant, I was contacted by Nancy Dickerson at the Child Support Enforcement Unit in Wake County. She requested that I sign a voluntary support agreement to pay approximately $165 per month. I asked if all the money would go to Jermaine she explained that if I paid that amount, only $50 would go to my child, and the rest would be kept by the state to pay for Ms. Medlin's AFDC grant. I told her that I did not think that was right because Jermaine had never been on AFDC and the state should not get Jermaine's support. Although I was, and am, interested and willing to support my son, I refused to sign the agreement unless the money would go to Jermaine.* [Emphasis added.]

"5. Soon after that meeting, a sheriff came to my job to serve me with a warrant for criminal non-support, case number, 85 CR 10961, Wake County. I was not there and had to pick up the warrant at the sheriff's office.

"6. I hired an attorney to assist me with this case because I did not believe I should have to pay support that would not be used for my own child. My attorney was unable to obtain the results I sought, which would have allowed my child to receive all my support. He advised me to sign a support agreement in the amount of $136 a month, which I reluctantly did."

3) Joyce Miles, 34, has five children, DeAngela Allen, age 17; Felicia Allen, age 14; Larry Miles, age 10; Johnetta Miles, age 6; and Kisha Miles, age 5. Ms. Miles does not have a full- or part-time job. She states:

"4. The father of my two younger children is John Brown. No legal paternity determination was ever made with regard to him and he has never been ordered to pay support. He has never supported these two children.

"5. The father of Larry Miles, Jr. is Larry Miles. He was originally ordered to pay support pursuant to Wake County 76 CR 64672. As of October 31, 1983 he was $4,803 in arrears. On July 18, 1984, he signed a Voluntary Support Agreement and Order in Wake County, 84 CVD 4576 to pay $108 per month toward current support $22 a month toward the arrearages.

"6. The father of the two oldest children is Arthur Allen. Pursuant to Wake County 83 CVD 3122, he regularly pays child support of $189 per month for his children.

"7. Prior to October, 1984, I was receiving AFDC in the amount of $244 per month for myself and my three younger children. The two older children were receiving $189 per month child support from their father.

"8. After October, 1984, the Wake County Department of Social Services required me to add my two older children to the AFDC application. I was informed that my entire grant would be terminated unless I reapplied and included all the children.

"9. Although I did not want to put my two older children on AFDC, because they are adequately supported, I did so because it was the only way I could receive any income for myself and the three younger children.

"10. When I added the two older children to the AFDC application, I was required to sign an Assignment of Rights to Support form (DSS 1201—attached) on their behalf. This assigned their support to the North Carolina Department of Human Resources.

"11. Because of this Assignment, my older children do not receive the $189 child support they are entitled to receive from their father. It is diverted by the Clerk of Court to the Department of Human Resources.

"12. With myself and the three younger children on the AFDC grant, my payment was $244 a month. With all five children on the grant, my payment is $288 a month. (I am currently receiving only $278 per month

because the Department of Social Services is collecting an overpayment.) I also receive a $50 monthly check, called the child support disregard.

"13. Because of the loss of most of the child support, I have been unable to provide for the two oldest girls as I was able to before. I have been unable to purchase such things as class rings, shoes and clothing."

4) Arvis Waters, age 29, has five children, Allen Walters, Jr., age 10; Andre Waters, age 8; Alise Waters, age 7; Bernard Williams, Jr., age 2; and Aaron Williams, age 1. Ms. Waters attends North Carolina Central University full time and participates in a work-study program while taking care of children, but she earns no income. Ms. Waters states:

"4. The father of my three oldest children is Allen Waters. He pays no support for his children. Because of his extremely violent behavior, I have been exempted from the requirement that I assist the Department of Social Services in obtaining support from him.

"5. The father of the two youngest children is Bernard Williams. He regularly pays child support of $45 per week for his children. He pays this support pursuant to an Order of the Family Court of the State of New York, County of Bronx, docket number P-78667/83, dated March 23, 1984.

"6. Due to my lack of income or child support for the three oldest children, I applied for

AFDC benefits for myself and three oldest children in August, 1984. Before the application was completed however, I was informed by my eligibility worker at the Durham County Department of Social Services that my two youngest children must also be included in the AFDC application.

"7. Although I did not want to put my two youngest children on AFDC, because they are adequately supported, I did so because it was the only way I could receive any income for myself or the three oldest children.

"8. When I added the two youngest children to the AFDC application, I was required to sign an Assignment of Rights to Support form (DSS-1201—attached) on their behalf. This assigned their support to the North Carolina Department of Human Resources.

"9. Because of this Assignment, my youngest children do not receive the $45 weekly child support they are entitled to receive from their father. It is diverted by the Clerk of Court to the Department of Human Resources.

"10. With myself and the three oldest children on the AFDC grant, my payment would have been $244 a month. With all five children on the grant, my payment is $288 a month. Although I am entitled to receive a $50 monthly check, called the child sup-

port disregard, I have not been receiving this.

"11. I appealed the decision requiring me to add my two youngest children to the AFDC grant and sign an assignment of their child support at a State Administrative hearing. On February 21, 1985, I received a Notice of Decision which upheld the County Department's decision that I must include my youngest two children in the AFDC application and assign their support to the state.

"12. Due to only receiving a total of $288 per month for me and my five children to live on, I am not able to provide my children with many of the things I would like to. For example, I can never buy my children new clothes and even though I keep my children clean, they often aren't dressed the way I would like or the way other children at day care are. Also, there is no money left after the necessary bills are paid and therefore I can never buy any toys or special things for them like other children in the neighborhood have. Next week is the birthday of one of my children and I cannot even afford a birthday present. If I got the support money for my two younger children, I would be able to at least buy a few things for them other than absolute necessities and then they wouldn't feel so left out. Also, my youngest child needs a car seat and a high chair and I cannot afford to buy either."

By supplemental affidavit, Ms. Waters offered this information:

"1. Since the time the Standard Filing Unit went into effect, my family and I have been off and on AFDC several times. I am not currently receiving AFDC benefits, but have reapplied.

"2. My understanding is that the father of my two youngest children regularly pays $45 a week into the Clerk of Court in Bronx, New York. This money is not transmitted to me or the Clerk of Court in Durham County, North Carolina on a regular basis. The Clerk in New York has informed me that the office there is too backlogged to send the money as it is paid in.

"3. I moved to North Carolina from New York in May, 1984. The last child support I received in New York was in April, 1984. I worked from May through August and did not receive any AFDC benefits during that time. Because of the backlog in New York, however, I did not receive any of the child support paid for those months.

"4. When I returned to school in September, 1984, I began to receive AFDC benefits. I received AFDC from September through December 1984.

"5. In November, 1984, accumulated child support of $495 was sent to me. This caused my AFDC check to be terminated effective December 1, 1984, despite the fact that this amount represented child support dur-

ing the months I worked and was not receiving AFDC. I had no income for December, January and a portion of February.

"6. I was permitted to reapply for AFDC in February, and was reinstated, at the rate of $288 a month, in March. I also received a pro rated check for part of February.

"7. I continued to receive $288 per month in AFDC benefits through July.

"8. In May, another accumulated child support check, for $585, was sent to me from New York. I reported this to the Department of Social Services and was informed that it would cause my AFDC to again be terminated. For reasons I do not understand, the AFDC check was not terminated, and I received $288 in AFDC through July.

"9. In August, my AFDC check was in the amount of $195. I was informed by my worker that my benefits were being reduced to recoup the benefits I received after receiving the May child support check. I have not been informed how much the department intends to recoup.

"10. Also in August, I checked with the Durham Clerk of Court's office and learned that $810 in child support had been sent from New York in July. This money was sent to the North Carolina Department of Human Resources. I immediately went to talk with my worker at Durham D.S.S. to learn how that money would be distributed. My

worker told me that if I returned the August AFDC check, I could receive all but $288 out of the $810 support check. The $288 would reimburse the state for the AFDC paid in July, the month the support was received.

"11. I returned my August AFDC check and voluntarily terminated my AFDC case, based on the information obtained from Durham D.S.S. At the end of August I received a check for $50, representing the disregard for the July support received.

"12. I return to D.S.S. to try to learn why I had only received $50. At that time my worker said he had been mistaken and that all the remainder of the $810 in child support would be retained by the state. I tried to get my August check back, but that request was denied. I reapplied for AFDC, but have not yet been certified or received any money.

"13. *Other than the one $50 payment I received in August, I have not received any child support disregard checks.* [Emphasis added.]

"14. As a result of being without income, I have absolutely no money. I have run out of just about everything that cannot be purchased with Food Stamps, such as soap, toothpaste, toilet paper, etc. My rent has not been paid for September. When my son had an asthma attack, I did not have enough cash to pay a cab to get him to the

health clinic. Both Aaron and Bernard are pigeon toed and need to wear hard shoes, but I cannot by [sic] them. None of the children have had any new clothes or shoes for several months. It is only through the kindness of a friend that I even have diapers for the baby. I am extremely frustrated and do not understand why my children cannot get the child support being paid for them."

5) Diane Jeffreys, age 25, has four children, Latoya T. Jefferys, age 8; Anettress T. Jefferys, age 5; Shanta M. Jefferys, age 4; and Anthony T. Jefferys, age 2. Ms. Jefferys is unemployed and is without any independent source of income of any kind. She states:

"4. I am married to Michael Jefferys, although we have been separated for many years. He is the father of Latoya and Anthony. As a result of a court order in the Wake County case 79 CVD 2360, he is required to pay $51 a week in support.

"5. Johnny Michael Shannon is the father of Shanta and Anettress. No paternity determination has been made by a court regarding Mr. Shannon, nor has be been ordered to pay support.

"6. Prior to October, 1984, I received AFDC for myself and Anettress and Shanta in the amount of $223 a month. I received child support from Michael Jefferys of $204 per month. The total was $427.

"7. After October, 1984, I was required to add Latoya and Anthony to the AFDC grant. Neither I nor the children's father wanted them added to the welfare unit, but I had no real choice because I had to have some income to support Shanta and Anettress.

"8. In November, 1984, my AFDC grant increased to $267 per month. I also received a $50 check each month as the child support disregard.

"9. I have not received a $50 disregard check since May, 1985. I later found out this was because Michael Jefferys stopped paying support. I don't know why he stopped paying support, but he has told me that he feels like when he pays, his children do not really benefit. He feels like he is supporting all my kids when he pays support.

"10. My AFDC check is now my only income. It has gone up to $294 because of the ten percent increase that went into effect July 1, 1985.

"11. After my income dropped, I experienced extreme financial difficulties. I could barely afford the rent of $200 per month for my house on my income of $427 per month. After the new rule went into effect and my income went down I got behind on my rent and was evicted in June. I could not find a place to live that I could afford on my lower income. I had to move in with my cousin, who already had a household of four. Due to her kindness my family has

> been able to stay there, but we really need a place of our own. I got behind on most of my other bills and have had a terrible struggle trying to keep the bunk beds I bought for my children. I cannot buy any clothes or shoes for the children, and have been getting used clothing from charitable organizations. I have had to miss several doctor's appointments because I have not had money to pay for transportation."

While plaintiffs' affidavits poignantly and effectively document the economic and personal consesequences of the SFU regulations, it is also helpful to note the actual income reduction suffered by those movant children who are forcibly included in the AFDC unit and whose child support rights are then assigned to the state. A chart supplied by the movants illustrates the income lost by each child previously receiving child support:

Family	Pre SFU	Post SFU	Reduction
Sherrod Thomas	$200/mo	$74 + $50 = $124	38%
Aaron & Bernard Williams	$194/mo	$96 + $50 = $146	25%
Felicia & DeAngela Allen	$189/mo	$96 + $50 = $146	23%
Latoya & Anthony Jefferys	$204/mo	$106 + $50 = $156	24%
Karen Medlin	$200/mo	$53 + $50 = $103	48.5%

V. THE CONTROLLING FEDERAL STATUTES AND REGULATIONS NOW REQUIRE THE STATE TO INCLUDE A CHILD RECEIVING ADEQUATE CHILD SUPPORT IN HIS OR HER FAMILY'S AFDC FILING UNIT AND TO COUNT THAT CHILD'S INCOME AS FAMILY INCOME.

In 1971, this court invalidated the North Carolina policy of classifying child support in amounts exceeding the state determined need levels as a resource available to the family in which the child lived and thereby reducing the amount of AFDC benefits for that family. This decision reflected the conclusion that this policy violated the intent of the Social Security Act as then written. The court found that the Act obviously intended to provide assistance only to needy children. Classification of a child as needy was based on a comparison of the child's resources with the state need standard. By demanding that a child receiving child support in excess of the need standard had to be included in the AFDC unit, North Carolina officials disregarded congressional intent to include only needy children in such units. In addition, in 1971, this court found that the North Carolina practice ignored the limitations imposed by 42 U.S.C. § 602(a)(7), which authorized state officials, in making need determinations, to consider a child's resources in determining a child's needs, but did not authorize nor require that resources available to only one child living in an AFDC home should be treated as a resource available to the whole family. Since a child receiving child support had no apparent legal duty to support the other members of his or her family, the child's income could not be treated as a family financial resource.

Plaintiffs now assert that, despite the changes made in the Social Security statute by the Deficit Reduction Act ("DEFRA") amendments, the Standard Filing Unit ("SFU") regulations continue to contradict the purpose of that Act by (1) including ineligible children in the assistance unit and (2) presuming that child support payments made to one child in a family represent income available to the family as a whole.

In order to evaluate plaintiffs' statutory challenges to the SFU regulations, it is helpful to examine the legislative history and the language of the DEFRA amendment.

In May, 1983, Secretary of Health and Human Services Margaret M. Heckler submitted a legislative proposal to Vice President George Bush as President of the Senate. Her proposal, aimed at minimizing state and federal AFDC expenditures and thereby reducing the federal deficit, contained a "group of related amendments to establish uniform rules on the family members who must file together for AFDC, and the situations in which income must be counted. In general, the parents, sisters and brothers living together with a dependent child must all be included; *the option of excluding a sibling with income, for example, would no longer be available.*" Page 1 of Exhibit A to Federal Defendant's Motion to Dismiss And In the Alternative For Summary Judgment. [Emphasis added.] In a "Section-by-Section Summary" of the proposed amendments to the Social Security Act, Secretary Heckler described those amendments captioned "Parents and Siblings of Dependent Child Included in AFDC Family" as follows:

> "Section 102 of the draft bill would further amend the plan requirements contained in sec-

tion 402(a) of the Social Security Act by adding a new requirement that the State include, as a member of the AFDC family (both the needs and the countable income of) the parents and the minor siblings of the dependent child for whom aid is claimed and who are living with the dependent child if the siblings are, themselves, deprived of parental support or care and under the age limit selected by the State.

"The general inclusionary rule does not, however, include stepbrothers and stepsisters of the dependent child nor does it include, if the dependent child has attained age 16, the employable parent of the child. Once it has been determined that the parent or sibling must be included in the AFDC family unit, one consequence is, as would be made explicit within paragraph (37), that *any income of the parent or sibling must be considered as part of the family's income* for purposes of determining eligibility and benefit amount, notwithstanding section 205(j) of the Social Security Act, in the case of OASDI benefits. This amendment would become effective October 1, 1983." *Id.* at pp. 3-4. [Emphasis added.]

Although the Secretary's legislative proposal was not adopted by Congress when it was originally submitted in the 1983 legislative session, similar changes were enacted as part of the Deficit Reduction Act of 1984. The legislative history of the 1984 Act demonstrates that Congress accepted the core of the Secretary's proposal when they passed 42 U.S.C. § 602(a)(38).

The Senate Finance Committee's explanation of the pertinent DEFRA change reads as follows:

B. Income Maintenance Provisions
Aid to Families With Dependent Children (AFDC) Provisions

1. Parents and Siblings of Dependent Child Included in AFDC Family (sec. 971 of the bill) (Contained in S. 2062 as originally reported)

Present Law

There is no requirement in present law that parents and all siblings be included in the AFDC filing unit. Families applying for assistance may exclude from the filing unit certain family members who have income which might reduce the family benefit. For example, a family might choose to exclude a child who is receiving social security or child support payments, if the payments would reduce the family's benefits by an amount greater than the amount payable on behalf of the child. In addition, a mother who is a minor is excluded if she is supported by her parents. However, if she has no income of her own which may be attributed to her child, the child may qualify for assistance as a one-person unit, and receive proportionately more in assistance than it would receive as part of a two-person unit. The income of the parents of the minor parent is not considered in determining the eligibility of the child.

Explanation of Provision

The provision approved by the Committee would require States to include in the filing unit the parents and all dependent minor siblings (ex-

cept SSI recipients and any stepbrothers and stepsisters) living with a child who applies for or receives AFDC. In addition, if a minor who is living in the same home as his or her parents applies for aid as the parent of a needy child, the income of the minor's parents would be counted as available to the filing unit. The rules that would be used in determining the amount of available income would be the same as are currently used in counting the income of stepparents.

This change will end the present practice whereby families exclude members with income in order to maximize family benefits, and will ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole. A similar provision was approved by the Committee last year, but was dropped in conference with the House.

S. Rep. No. 98-169, Senate Comm. on Finance, 98th Cong., 2d Sess., Deficit Reduction Act of 1984, Explanation of Provisions Approved by Committee on 3/21/84, 980 (Comm. Print 1984).

The Conference Report also indicates that, while the House initially made no change in the law, it later agreed to adopt the Senate amendment with one modification:

24. Parents and Siblings of Dependent Child Included in Filing Unit

Present law

There is no requirement in present law that parents and all siblings be included in the AFDC

filing unit. Families applying for assistance may exclude from the filing unit certain family members who have income which might reduce the family benefit. In addition, a mother who is a minor may be excluded if she is supported by her parents. However, if she has no income of her own which may be attributed to her child, the child may qualify for assistance as a one-person unit. The income of the minor parent's parents is not considered in determining the eligibility of the child.

House bill

No provision.

Senate amendment

Requires States to include in the filing unit the parents and all minor siblings living with a dependent child who applies for or receives AFDC. SSI recipients and stepbrothers and stepsisters are excluded from this requirement. In addition, if a minor who is living in the same home as his parents applies for aid as the parent of a needy child, the income of the minor's parents would be counted as available to the filing unit. The rules that would be used in determining the amount of available income would be the same as are currently used in counting the income of stepparents. Effective April 1, 1984.

Conference agreement

The conference agreement follows the Senate amendment with the following modification: amonthly [sic] disregard of $50 of child sup-

> port received by a family is established. The disregard is applied at eligibility determination and benefit calculation. The provision is effective October 1, 1984.

H. Conf. Rep. No. 98-861, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News (No. 6B) 751,1401.

Despite the DEFRA changes, plaintiffs contend that the children receiving child support payments in excess of the individual need standard cannot properly be included in an AFDC filing unit. Plaintiffs point to the language of 42 U.S.C. § 606(a) which defines "dependent child," the intended AFDC beneficiary, as a "*needy* child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home . . . or physical or mental incapacity of a parent, and who is living with [a relative] in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the state, under the age of nineteen and a full-time student . . . ." [Emphasis added.]

Plaintiffs argue that the child support income of the affected children makes them ineligible for assistance because, by virtue of receiving such payments, they are not needy children. Their individual incomes exceed the prorated state need standard for persons living in an AFDC unit.

However, the legislative history clearly shows that the intent of the DEFRA amendment is to measure need by assessing the aggregated resources of all family members. The legislative history also makes clear that the option of choosing which members of a fam-

ily may be included in the assistance unit is no longer available to families whose members have different individual sources of income. Consequently, the financial circumstances of an individual child are no longer determinative of that child's exemption from the AFDC unit but are now relevant to an appraisal of the eligibility of his or her mother and half sisters or brothers for AFDC benefits.

Plaintiffs further insist that a child receiving child support payments cannot meet the definitional requirements of § 606(a)(1). Such a child is not deprived of parental support. Defendants respond by offering a literal but credible interpretation of clause (a)(1) in light of DEFRA's legislative history. Defendants point out that deprivation is defined in terms of "support *or care*" [emphasis added] and argue that a child receiving child support may still be considered deprived because he or she is not cared for by his or her absent father. The court finds that the defendants' literal interpretation reflects the intent of the statutory modification accomplished by DEFRA.

Finally, plaintiffs state that "nothing in the statute or its Conference Report states that legally restricted child support payments should be counted dollar for dollar in making a determination of need for the dependent child. In fact, the statute never mentions child support, nor does the final Conference Report which accompanies it." Plaintiffs urge that § 602(a)(7) only directs a state agency to "take into consideration" the income of dependent brothers and sisters when making a determination of need. Plaintiffs suggest that the constitutional implementation of this construction would be to consider income of other deprived siblings but exclude any money that

was legally restricted for the use of only specified children. Plaintiffs find nothing in the legislative history to compel a different result. Instead, plaintiffs assert that a constitutional reading of the disputed statutory provisions will not permit counting income that is legally restricted for the use and benefit of only one child as family income. Plaintiffs believe that, when interpreted to avoid constitutional infirmities, the statute does not demand such attribution of income.

The court agrees that the constitutional approach to income evaluation would be to exclude legally restricted income. That would be the constitutional approach, but it was not the *congressional* approach.

The court has a duty, when possible, to construe a statute so as to avoid a constitutional question; nevertheless, to give this federal statute the reading plaintiffs suggest is to ignore its legislative history and to read it to be pointless legislation. Unless Congress intended to count the child support resources as available to the family as a whole, little or no saving would be accomplished. In addition, despite plaintiffs' attempts to offer a limiting reading of the statutory language, the Senate Report and the Conference Report obviously contemplate the inclusion of child support income in an applicant family's budget.

The Conference Report in particular confirms the intended consequences of the statutory amendments. After discussing the previous law which had imposed no requirement that parents and all siblings be included in the AFDC filing unit and after noting that families had been able to exclude from the filing unit members whose income might reduce the family benefit, the Conference Report indicates that "the conference agreement follows the Senate version with

one modification, the establishment of a $50 disregard of *child support* received by the family." [Emphasis added.] The Senate version, which required states to include in a filing unit the parents and all minor siblings living with a dependent child who applies for and receives AFDC, was designed to "*end the present practice whereby families exclude members with income in order to maximize family benefits, and will ensure that the income of families that live together and share expenses is recognized and counted as available to the family as a whole.*" S. Rep. No. 98-169, *supra* [Emphasis added.]

This Senate amendment, adopted by Congress with one modification in conference committee, tracks the Secretary's original proposal so closely that the Secretary's interpretation of the act's meaning through promulgation of regulations becomes important. One regulation, 45 C.F.R. § 233.20(a)(3)(ii)(D) (1985), offers particular assistance in clarifying the statutory meaning:

> (D) Income after application of disregards, except as provided in paragraph (a)(3)(xiii) of this section, and resources available for current use shall be considered. To the extent not inconsistent with any other provision of this chapter, income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

The regulatory distinction between "actually" available and "legally" available income corroborates the defendants' contention that Congress intended the

attribution of child support income to other family members as a means of reducing AFDC expenditures.

Thus, the only way Congress can have made the statutory presumption of availability effective is by pre-empting that portion of state child support laws that makes the child support money the exclusive property of the child in whose name the child support order was issued or in whose name the money was voluntarily delivered, regardless of the mother's handling or distribution of the funds. Otherwise, the child's money would be unavailable under state law and the statutory presumption would be only a figment of the congressional imagination. In *Heckler v. Turner*, —— U.S. ——, 105 S.Ct. 1138, 84 L.Ed.2d 138 (1985), the Supreme Court has recently explained that the principle of actual availability of resources and income has, for AFDC purposes, "served primarily to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes non-existent resources to recipients." The same limitation should presumably be applied to federal action regarding the attribution of income unless conflicting state law has been overridden by federal enactment. Plaintiffs reply that despite the explanation provided by the legislative history, Congress did not accomplish a pre-emption of state law that satisfies judicially defined requirements.

Here plaintiffs' statutory and constitutional arguments converge. If the pre-emption of certain elements of state child support laws has been accomplished, what are the constitutional ramifications of such a selective pre-emption? Can a child previously

entitled, under state law and often state court order, to receive a specific amount of monthly child support for his or her exclusive use and benefit be deprived of the protective restrictions on the use of his or her money by virtue of his or her membership in a particular type of family unit, a unit composed of children with child support income and children whose only source of support must be AFDC because their fathers are unable or unwilling to support them? Alternatively, if the attempted pre-emption has not been executed correctly, can the state confiscate child support pursuant to the state and federal regulatory guidelines, thereby depriving a targeted set of children of the still extant and otherwise enforceable protections of state law again because the child lives in a family with a particular configuration of members?

Those questions will now be addressed more fully.

VI. THE LANGUAGE AND LEGISLATIVE HISTORY OF THE 1984 DEFRA AMENDMENT DEMONSTRATE CONGRESSIONAL INTENT TO PRE-EMPT STATE LAW RESTRICTIONS ON THE USE OF CHILD SUPPORT THAT WOULD PREVENT THE STATE FROM TREATING ONE CHILD'S SUPPORT INCOME AS FAMILY INCOME.

North Carolina law obligates parents to support their offspring. N.C.G.S. § 50-13.4(b) requires that "the father and mother shall be primarily liable for the support of a minor child. . . ." N.C.G.S. § 50-13.4(c) further prescribes that "[p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of *the* child for health, safety, and maintenance . . . ." N.C.G.S.

§ 50-13.4(d) adds that child support payments for a minor child must be paid "to the person having custody, any proper agency, or to the court for the benefit *of such child.*" [Emphasis added.]

North Carolina courts have interpreted the state's child support laws to require that child support money be spent only on the child for whom the support has been obtained. In *Goodyear v. Goodyear*, 257 N.C. 374, 379 (1962), the North Carolina Supreme Court wrote:

> "While defendant [father] was and is obligated to make the monthly payments called for in his contract for the support of his children, plaintiff [mother] is not the beneficiary of the moneys which defendant must pay. These moneys belong to the children. Plaintiff is a mere trustee for them. That part of the payments not reasonably necessary for support and maintenance, she must hold for the benefit of the children and account to them when they call upon her. She cannot, by contract with another person, profit at the expense of the children."

Similarly, *Tyndall v. Tyndall*, 270 N.C. 106 (1967), recognized that a cause of action for the benefit of the children would exist if the custodial parent used the money paid for support of the children for any other purpose.

The statutes' own terms and their subsequent interpretation by North Carolina's highest court reveal the legal restrictions on the use and attribution of child support income. The affidavit of Judge Patricia S. Hunt, District Court Judge in North Carolina Judicial District 15B, explains how these restrictions work in practice:

"6. Under North Carolina statutory and case law, a District Court Judge is required to order the payment of child support based solely on the needs of the child and the needs and ability of the noncustodial parent to contribute to the support of the child.

"7. When setting the amount a noncustodial parent is required to pay for the support of a child, a District Court Judge *is not permitted to consider the needs of other children who may live in the household, who are not the children of the noncustodial parent.* [Emphasis added.]

"8. Under North Carolina Law, a District Court Judge cannot order a man to pay child support unless there has been a determination of his paternity of the child and therefore, a conclusion that he has a legal responsibility for support.

"9. When ordering the payment of child support, a District Court Judge specifically names the parent who is to pay the support and the child for whom the support is designated. *It is a violation of a court order for a custodial parent to spend the child support on other children not designated in the child support order.* [Emphasis added.]

"10. Under North Carolina law, parents have a legal obligation to support their children. If a custodial parent refuses to provide for the needs of his child, the child may be removed from his custody by court order and placed in the custody of the Department of Social Services."

Hunt Affidavit, p. 2.

Unless state law has been pre-empted, when North Carolina compels an AFDC mother to count child support income of only one child as a family financial resource, it requires her to violate the child support laws in order to obtain AFDC funds to support her other children.

A. Plaintiffs Have Standing To Challenge Whether Congress Has Pre-Empted State Domestic Relations Law.

The court does not agree with defendants' allegation that movants lack standing to raise what defendants refer to as "the Tenth Amendment issue." Plaintiffs can draw on the Tenth Amendment as support for their argument that state law, especially state family law, deserves special recognition and respect. Tenth Amendment precepts bolster plaintiffs' argument that the Supremacy Clause should be carefullly and sparingly applied *in the domestic relations context.* Plaintiffs, however, rely on Supremacy Clause cases which themselves demonstrate that individuals can raise Supremacy Clause questions without facing any standing obstacles. Although the Supremacy Clause and the Tenth Amendment (both structural constitutional norms) directly regulate relations between governments rather than the relations between governments and individuals, nevertheless, individuals should have standing to assert constitutional protections derived from them. *Cf. Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983). In *Chadha,* an individual facing deportation had standing to challenge a legislatively mandated procedure that violated the constitutional principle of bicameralism, another structural norm, as long as the individual had suffered an injury in

fact and could demonstrate that the judicial relief requested would prevent or redress the claimed injury.

B. State Domestic Relations Laws Are Not Pre-Empted Unless Pre-Emption Is Positively Required by a Direct Federal Enactment.

The United States Supreme Court has repeatedly recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-4 (1890); *Wetmore v. Markoe*, 196 U.S. 68 (1904); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). When state family law appears to conflict with a federal statute, the Supreme Court has limited its review under the Supremacy Clause to a determination whether Congress has "positively required" the pre-emption of state law "by direct enactment." *Wetmore v. Markoe, supra*, at 77. If that has been done, state family law provisions will be overridden only if they do "major damage" to "a 'clear and substantial' federal interest." *Hisquierdo v. Hisquierdo*, 439 U.S. at 581, *with references to United States v. Yazell*, 382 U.S. 341, 352 (1966). State laws have been struck down only when rights and expectations established under federal law are threatened by the continued operation of state law or when the enforcement of state law would frustrate or undermine the necessarily uniform implementation of Congressional policy.

The Fourth Circuit recently applied these pre-emption rules in *Caswell v. Lang*, 757 F.2d 608 (4th Cir. 1985). In *Caswell*, the court scrutinized an apparent conflict between the federal bankruptcy code,

11 U.S.C. § 1301 *et seq.*, and Virginia's child support laws. A Virginia father attempted to restructure his child support arrearages by including them in a Chapter 13 restructuring plan. The mother asserted that the bankruptcy court lacked the authority under the federal code to modify child support obligations established under state law and by state court order. The Fourth Circuit found that the bankruptcy statute gave "no suggestion that Congress specifically intended . . . to include past due child support obligations in a Chapter 13 reorganization plan. . . ." Therefore, it found no "clearly conflicting federal enactment" requiring the pre-emption of state law. 757 F.2d at 610 n.3.

Applying *Hisquierdo* and *Caswell*, movants argue that 42 U.S.C. § 602(a)(38), the DEFRA language at issue here, fails to demonstrate congressional intent to override state child support laws. Thus, plaintiffs propose that 42 U.S.C. §602(a)(38) fails to meet the *Hisquierdo* "positively required by direct enactment" standard. This court cannot agree.

C. The Language And Legislative History of DEFRA Demonstrate That Congress Did Intend To Pre-Empt State Law.

Congressional pre-emptive intent can be found most easily when the statutory terms address and residue the conflict with state law. *See, e.g., Hisquierdo, supra*, at 576 (Railroad Retirement Act, 45 U.S.C. § 231m, stated: "Notwithstanding any other law of . . . any State . . ., no annuity . . . shall be assignable or be subject to . . . attachment, or other legal process under any circumstances whatsoever . . . ." However, pre-emption has been recognized in contexts where congressional intent must be drawn from the language, structure and history of a statute

or set of statutes. As *McCarthy v. McCarthy*, 453 U.S. 210, 220-21 (1981), explained, "*Hisquierdo* did not hold that only the particular statutory terms there considered would justify a finding of pre-emption; rather, it held that "[t]he pertinent questions are whether the [state law] rights asserted conflict with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require non-recognition' " (quoting *Hisquierdo, supra*, at 538). As *McCarty* demonstrated, the meaning of statutory terms can often be confidently discerned only after an examination of the legislative history and the relevant federal program's history of operation. Review of subsequent implementing federal regulations also often clarifies legislative meaning and demonstrates congressional pre-emptive intent. *See, e.g., Ridgway v. Ridgway*, 454 U.S. 46, 53 (1981).

Invoking the *Hisquierdo/Yazell* principle that state family law can only be overridden if it threatens to do "major damage" to "a clear and substantial federal interest," plaintiffs also question whether the DEFRA amendment's objective (budgetary saving) represents such a federal interest and whether the continued enforcement of state child support laws would actually inflict "major damage" on efforts to reduce federal expenditures.

Though the exact magnitude of the anticipated saving is not known, the reduction of family benefits would be significant and, in this period of mounting public concern about the eventual economic consequences of increasingly large federal deficits, neither the saving nor the statutory objective can be characterized as insubstantial.

The court therefore finds that Congress has preempted state child support laws in so far as those

laws restrain the use and distribution of child support income received by a child who lives in a home in which the mother and her other children rely on AFDC in order to live.

After exploring the DEFRA amendment's legislative history and implementing regulations, the court is confident that Congress contemplated the conflict between its objectives and state law and chose to pre-empt those protective restrictions that would prevent the treatment of one child's child support income as a family financial resource.

It is possible that this court's reading of *Hisquierdo* and its progeny may not show sufficient deference to state law. Perhaps when the state law affected governs as important an aspect of domestic relations as the enforcement of the parental duty to support minor children, a reviewing court should demand greater precision in the actual legislative text before recognizing a congressional intention to pre-empt state law. *Cf. McCarty v. McCarty, supra,* at 237, 246 (Rehnquist, J., dissenting) (After reciting the "positively required by direct enactment" test from *Wetmore* and *Hisquierdo,* Justice Rehnquist argued that "[t]he most the Court can advance are vague implications from tangentially related enactments or Congress' *failure* to act. The test established in *Hisquierdo* established that this was not enough." Justice Rehnquist, joined by Justices Stewart and Brennan, insisted that "pre-emption by negative implication" was insufficient under *Hisquierdo.*) With that possibility in mind, the court will analyze the constitutional deficiencies posed by the federal statute and state and federal regulations from alternative premises: first, that a pre-emption of state law has been accomplished and, second, that it has not.

VII. THE FEDERALLY SANCTIONED STATE REQUIREMENT THAT MOTHERS SEEKING AFDC FOR THEIR UNSUPPORTED CHILDREN MUST ASSIGN TO THE STATE THE CHILD SUPPORT RIGHTS OF AN ADEQUATELY SUPPORTED CHILD UNCONSTITUTIONALLY DEPRIVES THE SUPPORTED CHILD OF PROPERTY. WHEN THE STATE COOPERATES WITH A FEDERAL PLAN TO COMPEL A MOTHER TO SURRENDER ONE CHILD'S INCOME SO THAT THE REMAINING CHILDREN CAN SURVIVE ON AFDC, THE STATE TAKES PROPERTY FROM THE CHILD'S TRUSTEE AND IMPOSES AN UNCONSTITUTIONAL TAX ON THE SUPPORTED CHILD'S MEMBERSHIP IN A PARTICULAR TYPE OF FAMILY UNIT. THE STATE THUS BECOMES THE FEDERAL GOVERNMENT'S PARTNER IN A TAKING.

A. The Child Receiving Adequate Child Support Suffers A Loss Of Property As A Result Of The Enforcement Of The SFU Regulations.

Defendants emphasize that families choose to participate in the AFDC program and contend that such voluntary action eliminates the possibility of a taking or other constitutionally cognizable injury. The child receiving child support can and does make no choice regarding participation. The minor child automatically becomes a member of the AFDC unit if his or her mother and half-siblings apply for assistance. As a minor, the child's financial affairs are handled by the mother/caretaker. The falsity of the

freedom of the mother, whose options are to reduce one child's child support income or cut her other children off from their sole source of support, AFDC, is painfully clear.

Defendants propose that mothers in mixed income families have the option of continuing to spend an amount equivalent to the full child support amount on the child entitled to child support even after he or she becomes a part of the AFDC unit. The child's income level could, according to defendants, be maintained in this way even while the SFU regulations are in operation. That "option" is illusory. If a mother did spend such a disproportionate share of her AFDC grant on one child, she would surely violate 42 U.S.C. § 605, which requires a mother/caretaker to use the grant money in the best interest of *all* the children in the unit or face administrative review of her conduct, possibly subjecting herself to civil or criminal penalties.

State defendants suggest that their regulations do no more than "*authorize* . . . sharing" between children (emphasis added). What defendants really do is *require* the sacrifice of income a child has no duty to provide to his or her family. The child entitled to child support has no legal duty to support his or her mother and half-siblings. This is demonstrated by the fact that, even under the SFU regulations, if such a child moved out of the mother's household and lived with the father, neither the child nor the father would have to continue to contribute to the support of the mother and her other children. State defendants also argue that the child receiving child support experiences no loss of income as a result of the assignment of rights and the child's forcible inclusion in the AFDC unit. The child's income, according to

defendants, only "passes through" the state to the child! Since only fifty dollars flows back to the child alone, it is difficulty to accept defendants' proposition that no loss of income has occurred. If the child deposited $200 in a bank, for example, and was told, upon attempting a withdrawal, that only fifty dollars was unconditionally retrievable, it would be hard to convince either the child or an observer that nothing had been lost. Defendants propose that the child derives certain value-equivalent, albeit unasked for, benefits from the assignment system that, in effect, compensate the child up to the level of the original support amount. For example, the defendants assert that the now poorer child is "happier" for having "shared" his or her income with the mother and needy half-siblings. It may well be that one child wished to help another, but that possibility is no justification for the government to take what the child has not offered.

Another hypothetical form of compensation suggested by defendants is the enhanced security the state provides by policing the absent father's delivery of support and pursuing him upon failure to make full payment. Defendants' service, of course, no longer principally benefits the child but primarily works to the advantage of the state and federal treasuries. In addition, it is far from clear that a rational person in the position of the child entitled to child support would pay such a substantial portion of his or her income for the questionable security now offered, *arguendo*, by counsel.

Defendants' system has already discouraged some absent fathers from continuing to honor their support obligations. *See* Thomas Supplemental affidavit, ¶¶ 1-7 (describing John Pennington's refusal to sup-

port his son Sherrod when the total amount would no longer go to Sherrod); Jefferys Affidavit, ¶ 9 (recounting Michael Jefferys' discontinuation of support payments in reaction against the SFU system); Medlin Affidavit, ¶ 12 (describing Bobby Harrington's objection to the assignment of daughter Karen's income and Ms. Medlin's decision to send Karen back to her father rather than jeopardize or diminish the child's income). These negative paternal reactions present a risk of non-collection ignored by the defendants. The cost of pursuing deliberately delinquent fathers will not be insignificant. Also, those fathers who voluntarily provide regular support payments but whose paternity has not been legally established will prove particularly difficult and costly targets for collection. District Court Judge Hunt has stated:

> 13. If a father refuses to pay support, I have very few legal tools to utilize to force him to pay child support.
>
> a. I can threaten a father with a jail term, or actually order him to jail, but a father does not pay child support while he is in jail, so that a jail term rarely results in income for the family.
>
> b. I have the power to garnish wages, but I have found that fathers who fail to accept their responsibility and do not want to pay support change jobs frequently in order to avoid court orders. Another problem with the garnishment of wages is that in North Carolina, especially in rural counties, the employers who do not want to bother with the paperwork of garnishment will fire their employees or will pay them under the table in order to avoid the garnishment order. Although I tell fathers they have a legal remedy

> if the employer fires them, the reality is that the employers find another excuse to fire the employee.

Hunt Affidavit, ¶ 13.

In light of these facts, the compensatory value of state collection security appears minimal at best and far less than the monetary loss experienced by the supported child.

B. By Pre-Empting State Law Restrictions On The Use And Distribution Of Child Support Paid By A Father For The Benefit Of His Child, DEFRA Becomes The Instrument Of A Taking.

Regardless of the "relative importance to the state of its own law," "when there is a conflict with a valid federal law," the federal law must prevail. *Free v. Bland*, 369 U.S. 663, 666 (1962); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 210-211 (1824). Assuming that Congress has communicated its goal of pre-empting state child support law with the requisite clarity, the constitutional validity of the federal enactment is doubtful. The DEFRA amendment and the state and federal regulations under it dilute the protection state law offers to certain children receiving child support. The selective pre-emption of state law represents an unconstitutional taking that deprives the children of their entitlement to child support simply because they live with a needy mother and half-siblings.

The child receiving child support has access to this income only through his or her caretaker, who acts as a trustee administering the child's money. However, as explained by the previously discussed

North Carolina Supreme Court decisions, until the passage of DEFRA, the money belonged *only* to the child. Even if Congress has pre-empted the legislatively created and judicially imposed obligation of the caretaker/mother to use a child's income only for that child, the child retains the *right* to receive child support, even to receive the *same amount* of child support as was prescribed by an original child support order, which was formulated on the assumption that the total amount was necessary to meet the child's basic needs. However, under the DEFRA/SFU plan, the child has lost the previously existing guarantee that the caretaker will act as a trustee, using the child support received only for that child's benefit. Thus, although the *right* to the specified amount of child support has not been extinguished, the right has clearly taken on a new, shrunken form.

C. A Taking Can Occur When Regulation Reshapes A Property Right.

In considering whether a taking has ocurred in cases involving government regulation, a court traditionally looks to the economic impact or the regulation, the regulation's interference with investment backed expectations, and the character of the challenged government action. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Intangible interests comparable to the right to receive and use a court-ordered amount of child support have been recognized as property for the purposes of takings analysis. *See e.g., Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (trade secrets; health, safety, and 364 U.S. 40 (1960) (materialman's lien); *Lynch v.*

United States, 292 U.S. 571 (1934) (valid contracts).

As a result of the DEFRA/SFU regulations, a child previously entitled to child support has lost the right to enforce the fiduciary obligation that prohibited the mother from spending the money on anyone other than the designated child. The right to exclude others is generally "one of the most essential sticks in the bundle of rights commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Although the child receiving child support income remains entitled to the full child support amount, as evidenced by the state's acquired right to institute legal action against a father who does not pay the whole amount, the child can only maintain *unrestricted access* to the money if the child lives in a household separate from his or her mother and half-brothers and sisters. This condition on access significantly diminishes the value of the child's enforceable right. *Cf. Moore v. City of East Cleveland*, 431 U.S. 494, 520 (1977) (Stevens, J., concurring) analyzing single family occupancy zoning ordinance that applied restrictive definition of family as a taking in which unjustified restrictions were imposed on the affected property-owner's right to use her property as she saw fit).

When a regulation goes too far in reducing the values incidental to property, a taking has occurred. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). From the perspective of the child receiving child support, that is what has happened here. Borrowing from the language of *Armstrong v. United States*, 364 U.S. at 48, "[b]efore the [child support rights] were destroyed, the [children] had compenssable property. Immediately afterwards, they had

[substantially less]. This was not because their property vanished into thin air. It was because the government for its own advantage destroyed the value of [their rights]."

Although, for example, the child's father must continue to pay are full court-ordered amount or face prosecution by the state, the child will now receive unqualified use of only fifty dollars from that amount. Thus, the child experiences a significant adverse economic impact as a result of the SFU regulations if his or her half-brothers or sisters need to receive AFDC. From the absent father's point of view, a corollary harm occurs. Under the SFU regulations, his investment in the child's well-being and development, his child support payment, is diverted away from his child to the state through the forced attribution of that money to the child's mother and half-siblings. Thus, what once was the child's becomes the state's under the unvalidated assumption that the money belongs to the family as a whole.

A sovereign "by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). This is particularly true when only a segment of a particular set of right-holders are selected to bear such a loss. The Takings Clause "guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people to bear public burdens which in all fairness should be borne by the public as a whole." *Armstrong, supra*, at 49.

Under the DEFRA/SFU regulations, of all the children receiving child support in North Carolina, only those who live with needy half-siblings are re-

quired to contribute a significant portion of their income to the state in the name of their needy half-siblings in order to reduce state and federal AFDC expenditures. Thus, not only are the affected children deprived of certain valuable "sticks," such as exclusive use of their money, from their child support property "bundle," *Kaiser Aetna, supra*, they are so deprived *on the basis of the composition of their family*, a constitutionally impermissible basis, and to the detriment of a fundamental constitutional interest, the right to maintain existing family relationships.

D. Even If Congress Has Failed To Pre-Empt Those Elements Of State Law That Would Deny The State Access To The Child Support Income Of An Adequately Supported Child Living With His Or Her AFDC Dependent Family, The State Has Forced Mothers To Surrender The Child's Property To The State In Violation Of the State's Own Laws.

If Congress has *failed* to pre-empt state law, the legal protections of the child's income under state law still exist, but *they are simply not enforced on behalf of the plaintiff class of children.* If the mothers need to obtain AFDC for the other children in the family, the children entitled to child support see the bulk of their income (anything over the first $50) taken by the state under the forced assignment system, after the money has been funneled through their half-siblings by means of the "availability" fiction. The state, wearing the cloak of federal authorization, effects an unconstitutional taking by using one set of children' needs as a lever to coerce a mother either to break her legal obligation to the child receiving child

support or to see her other children go hungry without AFDC.

From the perspective of the child receiving child support, the failure of the state to enforce its own laws restricting the use of his or her income, and the state's taking of the money from his or her mother under duress represent a deprivation of property in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The child loses the use of the child support money solely because the child resides with his or her mother and needy half brothers and sisters.

From the mother's perspective, the SFU regulations require her to break one existing law to honor another. The irrationality of imposing such contradictory obligations illustrates how these regulations fail to comport with Due Process. The fact that only women who strive to maintain households composed of both children with child support income and children with no source of income other than AFDC face such an irrational choice exposes the simultaneous substantive Due Process and Equal Protection failings of the regulations.

VIII. A DEPRIVATION OF PROPERTY THAT SIMULTANEOUSLY INFLICTS DAMAGE ON A FUNDAMENTAL INTEREST, FAMILY AUTONOMY, TRIGGERS SPECIAL JUDICIAL SCRUTINY OF GOVERNMENT ACTION CAUSING SUCH INJURIES.

A government does not have unlimited power to redefine property rights, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and whatever power government does have cannot be exercised in a way that penalizes people, especially

children, on the basis of their family status. To take property from such persons on that basis violates constitutional principles of Due Process and Equal Protection.

Examined from that perspective, the harm inflicted in this case begins to bear an alarming resemblance to the harm redressed in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). In *Moore*, a city ordinance limited occupancy of a dwelling unit to members of a single family, but defined "family" so that a grandmother living with two grandsons who were first cousins, not brothers, did not qualify. Under the ordinance, it became a crime for the grandmother to live with the two boys. Striking down the ordinance as unconstitutional, the Court wrote:

> "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974). A host of cases, tracing their lineage to *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479 (1965) . . . [additional citations omitted]. Of course, the family is not

> beyond regulation. *See Prince v. Massachusetts*, *supra*, at 166. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the government interests advanced and the extent to which they are served by the challenged regulation."

431 U.S. at 499.

The *Moore* court held that the constitutional right to live together as a family did not belong to only the nuclear family—a couple and their dependent children. *Id.* at 502. With that in mind, the *Moore* majority invalidated the challenged ordinance on substantive due process grounds, finding that the ordinance sought to standardize families and children, "forcing all to live in certain narrowly defined family patterns." *Id.* at 506. The SFU policy has the same effect, especially for families like Mary Medlin's in which a child, like Karen, is sent away from her home with her mother and half-siblings, back to her father so the child can receive her full amount of child support without simultaneously rendering the mother's other children ineligible for AFDC.

Defendants are mistaken in their contention that their actions deserve only minimal scrutiny. Defendants' invocation of the minimal rationality standard applied in cases such as *Dandridge v. Williams*, 397 U.S. 471 (1970), *Schweiker v. Hogan*, 457 U.S. 569 (1982), and *Califano v. Aznavorian*, 439 U.S. 170 (1978), suggests the use of a standard inappropriate for this case. Defendants find these cases controlling only by misconstruing the focus of the inquiry. The cases cited by defendants deal only with a governmental decision to withhold a non-contractual

welfare benefit. This case, however, addresses a governmental decision to intercept the delivery of *private* property, the full child support amount ordinarily available *from the father* (not the state) to the affected child. The impact of this action on the child's fundamental associational rights and on a property right require a more rigorous examination than defendants suggest and than their behavior can withstand.

Finally, defendants attempt to meet the plaintiffs' serious questions about the burdens the SFU system imposes on family life by arguing that government can influence important choices, even choices regarding the exercise of a fundamental right, through the use of economic disincentives. *Maher v. Roe*, 432 U.S. 464 (1977), relied on by defendants, proceeded upon the assumption that though the unavailability of Medicaid funding might influence a poor woman's decision to have an abortion, it did not absolutely preclude her from doing so. A poor woman had no absolute right to such Medicaid coverage. Even though she did have a right to have an abortion, she did not have a right to a *state subsidized* abortion. Here, however, a child entitled to child support must sacrifice one right to exercise another. If the child wants to live with his or her family, consisting of a mother and half-siblings, the child must surrender a right to private property, the right to derive exclusive use and benefit from money awarded to the child by state court order or voluntarily provided by an absent father. The cases cited by defendant do not control.

A. Whether Accomplished By Means Of Federal Pre-Emption Or Otherwise, The Expropriation Of The Supported Child's Property In Order To Reduce Governmental Expenditures Punishes The Child For Exercising The Child's Fundamental Right To Live With His Or Her Family.

An otherwise valid government objective, deficit reduction, cannot be accomplished by means of the discriminatory imposition of burdens. *See, e.g., Metropolitan Life Insurance Company v. Ward*, —— U.S. ——, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985). By requiring AFDC applicants to count the child support income of selected children as a family resource, the federal and state governments impose a thinly disguised tax on the child because of membership in a particular type of family. To improve this type of invasive tax on children due to family circumstances beyond their control is constitutionally intolerable. *Cf. Plyler v. Doe*, 457 U.S. 202 (1982) (Texas statute denying public education to illegal alien children violated the Equal Protection Clause of the Fourteenth Amendment. The statute irrationally imposed a lifetime hardship on a discrete class of children not responsible for their undocumented status.)

The Supreme Court has already acknowledged:

> ". . . [O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is 'illogical and unjust.' "

Gomez v. Perez, 409 U.S. 535, 538 (1973), *with reference to Welser v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (*Gomez* found that a Texas law denying the right to parental support to illegitimate children while giving it to legitimate children violated the Equal Protection Clause). The concerted action of the federal and state governments here is equally "illogical and unjust." A child has no control over the composition of the family into which he or she is born. Therefore, the nature of the child's family cannot be the basis for the legislated deprivation of essential support.

B. The Supported Children Should Not Be Penalized For Their Mother's Alleged Past Breaches Of A Fiduciary Duty.

Both state and federal defendants contend that the DEFRA program causes no harm to the affected children because it simply recognizes and institutionalizes the actual financial practices of mothers in households composed of children receiving child support and children dependent on AFDC. They say that the child entitled to child support experiences no actual diminution of income, because mothers in mixed income families had been spending the child support money for other children's needs even before the regulations went into effect. They say their regulations now only reflect current family financial practices, and do not cause any alteration of family life.

This argument may suffer from reliance on unsubstantiated and inaccurate assumptions about maternal conduct before the SFU regulations went into effect. The testimony of plaintiff Diane Thomas is a firsthand account of real life before the SFU regulations went into effect: ". . . I used the money for

both of them, sure did. If he needed something and his check was late I would use Crystal's [child support] money *and it was vice versa.*" Thomas Deposition, p. 35 [emphasis added]. Ms. Thomas used money, a fungible commodity, fungibly. She drew from whatever resource was available at the time a need arose. This does not necessarily mean, when the family accounting (if any) was done, that, dollar for dollar, the child entitled to a full child support amount actually received any less than that amount by the end of a given month in the pre-SFU period.

More importantly, this argument by the defendants ignores the fact that the mothers, who, in moments of financial crisis, spent child support money on other children, violated their fiduciary duty to spend the money only on the specified child. The fact that some mothers may have redistributed income within a family fails to erase the legal obligation *not* to do so *and does not reduce the amount of child support owed the children.*

To dilute the rights of children to support, because some mothers, under financial stress, fail to carry out their legal duty to use the money solely for particular children, penalizes the children for parental misconduct in a manner condemned by the Supreme Court in *Plyler, supra*, at 220:

> "Their 'parents have the ability to conform their conduct to societal norms,' . . . but the children . . . 'can affect neither their parents' conduct nor their own status.' *Trimble v. Gordon*, 430 U.S. 762, 770 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental con-

> cepts of justice. '[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to *the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.* Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.' *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (footnote omitted)." [Emphasis added.]

This is why the procedural due process approach of several other courts who have addressed this controversy in other states fails to redress the constitutional wrong done. *See Gorrie v. Heckler*, 624 F. Supp. 85 (D. Minn. 1985); *Johnson v. Cohen*, No. 84-6277, slip opinion (E.D. Pa. October 3, 1985). Requiring (as some courts have done) a pre-termination or pre-reduction hearing to determine whether a mother who is applying for AFDC has in the past spent one child's support money on her other children ignores the immateriality of that determination to any adjudication of the child's rights.

C. The DEFRA Scheme Endangers Family Integrity And Undermines The Well-Being Of Family Members.

Regardless of whether pre-emption has occurred, the DEFRA plan and the SFU regulations inflict needless additional burdens on already vulnerable families and threaten to disrupt already strained family relationships.

The implementation of the regulations can cause the dislocation of the child receiving child support

and the disintegration of the family unit to which the child belonged. *See Medlin Affidavit*, ¶ 12. Plaintiff Mary Medlin sent her daughter Karen to live with Karen's father, Bobby Harrington, to preserve the child's income. Although membership in the intimate community of a particular family may not be chosen by the child, it can, nonetheless, be cherished by the child. The Supreme Court has recognized that the "importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association" in a family's home. *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977).

Mothers are also adversely affected. Pressure of the new regulations on low income mothers can be a source of anxiety. The state suddenly extinguishes or ignores the mothers' duty to deliver child support payments to the child to whom the money is given. A mother must then choose whether to continue to abide by that duty or to deny her unsupported children, whose well-being is also her responsibility, their sole source of subsistence. After complying with the SFU regulations, the mothers see their family income reduced from its already meager levels and must watch *all* their children suffer as a result. *See* Arvis Waters Affidavit, ¶ 12 (AFDC income was so low mother was unable even to purchase a small birthday gift for child); Diane Jefferys Affidavit ¶ 11 (reduction of income compelled mother to move in with her cousin's family and to rely on family members and charitable organizations for help in meeting her family's basic needs). Mothers have also been threatened with physical violence by fathers who angrily reject the idea that the children they are supporting are being placed on welfare. *See* Diane Thomas Affidavit, ¶ 8.

These government created conditions undoubtedly test these mothers' capacity to cope with the already daunting task of keeping their families intact. If a father decides to stop supporting his child as a result of the SFU regulations, or if he refuses to see the child when he goes on AFDC despite the father's best efforts to support him, the child and his or her mother may well also lose access to the father's kin network, which can offer broken low-income families a valuable source of support in times of crisis. *See* Declaration of Duke University professor and anthropologist Carol Stack, ¶ 9. When a mother and child are cut off from that source of aid:

> "[T]he mother is placed under great emotional and physical stress, and the child, in consequence, whose development is already at risk, is placed in an even more vulnerable position . . . . A study of child abuse by Michael Wald, Professor of Law at the Stanford University Law School, demonstrates that mothers and children are more vulnerable when there is a lapse in the viability of the family network. When mutual aid is provided by the kin network, children are less at risk; when the mother becomes unable to rely on the network, that is when the incidence of child abuse, neglect and other problems increases." *Id.* at ¶ 15.

D. The DEFRA/SFU Plan Contradicts Existing Incentives For Fathers To Recognize And Honor Their Duty To Support Their Children.

The evidence shows that the SFU objective, the attribution of the whole family of money paid by an absent father for his or her child alone, and the in-

clusion of the father's child in an AFDC unit, frustrate and anger fathers who have met their legal and moral obligations to support their offspring. Fathers justifiably proud of being able to keep their children off welfare by paying regular support now see that accomplishment erased. Such a father is powerless to keep his child out of the welfare system as long as the child lives with the mother and needy half-brothers and sisters. (A child often lives with the mother because she has been awarded legal custody by a state court or because the father is unable or unwilling to allow the child to live with him.)

The fathers' perceived loss of control over their children's fates causes some fathers to refuse to continue to provide support. Fathers who rebel against the system by withholding support that will no longer go to their children face criminal prosecution for non-support. *See* Affidavit of James Richardson, father of Ms. Medlin's son Jermaine, ¶ 5. Other fathers react by withdrawing from their children's lives, sending a monthly support payment but never seeing the child. For instance, Sherrod Thomas' father, John Pennington, began to withhold support for Sherrod when he learned the money was being assigned to the state so Ms. Thomas and her daughter Crystal could qualify for AFDC. Mr. Pennington eventually resumed his payment of support but no longer visits his son, whom he had previously seen regularly. Mr. Pennington has told Ms. Thomas that he stopped seeing his son because the child is on AFDC. Upset and puzzled by his father's behavior, Sherrod has begun to display inappropriate behavior at home and at school. *See* Diane Thomas Affidavit, ¶ 11, and Diane Thomas Supplemental Affidavit, ¶¶ 1-7.

The fathers' reactions validly demonstrate not only how the SFU system weakens family relationships but also how the SFU regulations undermine other measures enacted to reinforce an absent father's sense that he has a duty to support his child. *See, e.g.*, 42 U.S.C. § 651 (Supp. II 1984) (providing federal support for state efforts to improve collection of child support); *McClelland v. Massinga*, No. 85-1138, —— F. 2d. —— (4th Cir. 1986) (upholding against due process challenge Maryland State Tax Refund Intercept Program, which authorizes the state Comptroller to withhold the tax refunds of fathers delinquent in paying their child support).

Historically, public policymakers have seen the enforcement of child support obligations as essential to keeping children off welfare. *See Hisquierdo, supra*, at 576 ("Concerned about [Railroad Retirement] recipients who were evading support obligations and thereby throwing children and divorced spouses on the public dole, Congress amended the Social Security Act by adding a new provision, § 459, to the effect that, notwithstanding any contrary law, federal benefits may be reached to satisfy a legal obligation for child support or alimony . . . 42 U.S.C. § 659" [footnote omitted]). *See also* 1984 U.S. Code Cong. and Admin. News 2402, Sen. Rep. No. 98-387 (Examining the legislative history of federal child support enforcement initiatives, the Senate Finance Committee found that its 1974 proposal to create a new child support enforcement program had been explained as follows: "The Committee believes that all children have the right to receive support from their fathers. The Committee bill . . . is designed to help children attain this right, including the right to have their fathers identified so that support can be

obtained. The immediate result will be a lower welfare cost to the taxpayer but, *more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.*" [*Emphasis added.*]).

Here the angry fathers do not abandon their children to welfare; they see children they are supporting conscripted into the welfare system. Drawing on her studies of low income families in general and of low income black families in particular, Duke University Professor Stack describes the fathers' experiences:

> "12. When it is possible for a father, married or single, to provide enough child support to keep his child off the welfare rolls, this act of responsibility and integrity brings status to the father, especially in communities in which a future of chronic unemployment is a real risk for many children. This is not to imply that being on welfare necessarily entails a stigmatized status, for it is a necessity for the majority of black mothers. Rather, there are incentives within the structure of black communities, as well as in the public sector, that encourage fathers to keep their children off the welfare rolls. A father gains great self esteem and status in low income communities if he can give his child the chance for a life of gainful employment rather than welfare dependency.
>
> "13. In communities whose families live in poverty, fathers who are able to support their children are considered to have a depth of character and integrity that defies unfair myths and

stereotypes about fathers in general, and black fathers in particular. A law that tells fathers that their efforts cannot keep their children off the welfare rolls, or that what they can provide is not good enough, challenges the efforts and integrity of good men and fathers. Feelings of anger, frustration and shame are not inappropriate or unexpected. The anger is sometimes vented at children, sometimes at mothers, more often both."

Stack Declaration, ¶ 12 and ¶ 13.

In performing her child support enforcement duties, North Carolina District Judge Hunt has also learned about the incentives and disincentives to which fathers respond:

"11. . . . One of my greatest tools for instilling . . . responsibility has been a lecture to the parents about the importance of supporting a child and thereby removing that child from the public assistance rolls. I usually give the parents thirty (30) days to go out to find a job. I have observed the pride of accomplishment with which fathers have responded when they return to court to announce that they have obtained employment and their child will no longer be on 'welfare'.

"12. Conversely, I have also observed the outrage a father has expressed when I have had to explain to him that even though he is providing support for his child, his child must be placed on the AFDC rolls so that the other children in the household can get AFDC. One father exploded in the courtroom yelling 'I won't have my child on welfare! I support him. And I' not going to support anyone else's children!' I fully expect to

continue hearing fathers' refusals to pay child support when they learn that their child support is being paid to the Department of Human Resources instead of to their children, and when they discover that their child is on welfare even though they are paying support regularly.

* * * * *

"15. As a result of the standard filing unit regulations, I can no longer encourage fathers to take responsibility for their children by talking to them about the importance of removing their children from the welfare rolls. They can no longer free their children from welfare unless they can pay enough money to support the entire family. Most of these fathers are making minimum wage, and they will never be able or willing, to pay child support for children not their legal responsibility and thus they cannot even rescue their own child. Many of these fathers grew up on welfare and they are very sensitive to the invasion of privacy the household experiences when the social workers come into their homes and to the lack of a father involved in their lives. They know and understand the pride the child feels when he or she can say 'my daddy supports me.' These fathers know firsthand that the children will grow up knowing that they are on welfare and that their mothers depend for support on a check each month from the Department of Human Resources and that food stamps buy the groceries. It isn't the same as financial and emotional support from your own father.

"16. It is my experience that responsible people obey laws because they have something to lose—their money, their reputation, their free-

dom, or their pride. A substantial portion of our population has no money or reputation. When we take away their pride they have nothing to lose but 30 days in jail and there the whole scenario begins again."

Hunt Affidavit, ¶ 11, 12, 15, 16.

The documented effect of the SFU regulations on previously cooperative fathers' willingness to pay child support not only demonstrates how the regulations interfere in family life but calls into question the extent to which the DEFRA/SFU plan will actually achieve its goal, turning the pockets of selected fathers into a new source of government revenue. As *Moore v. City of East Cleveland, supra,* admonished, when government regulation penetrates the private realm of family life, as it certainly has here, such government intervention will only be tolerated when government can demonstrate that an important government interest is advanced by the regulation and that the mechanism chosen to advance the interest actually serves that end. 431 U.S. at 499.

E. By Forcing The Realignment Of Parental Duties, The Federal And State Governmental Actions Weaken The Underpinnings Of Family Life.

The required SFU regulations give the state significant leverage over the affected families and obviously influence crucial decisions about how, where and by whom children will be raised. Our Constitution protects the "liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535 (1925). *See also Wisconsin v. Yoder,* 406 U.S. 205, 232-233 (1972).

Significantly, here, the state's motive for intervening in the "private realm of family life," recognized in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), is *not to improve the lot of any member* at the expense of the liberty of others. Rather, here the government enters and influences family relationships in the name of state budgetary savings, to the financial and probable emotional detriment of all family members. Such interference ironically occurs in a program, AFDC, which operates under the following "authorization of appropriations":

> "For the purpose of *encouraging the care of dependent children in their own homes or in the homes of relatives* by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living *to help maintain and strengthen family* life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children."

42 U.S.C. § 601 [emphasis added].

Using the plaintiffs' experiences as references, the children receiving child support experienced reduc-

tions in income of between 23% and 48.5% when they were included in the AFDC unit. The AFDC income available to meet the needs of the mother and her other children is also reduced, and the absent father experiences a reduction of the value of what could be called his child support investment. He is no longer assured that, for example, his $200 payment will help his child survive or thrive. Now only a fraction of his money will go to *his* child and the remainder will become the father's contribution, ostensibly to his child's half-brothers and sisters to whom he owes no duty to support, but actually to the state and federal treasuries.

These facts illustrate how the DEFRA/SFU regulations represent the nationwide resurrection of the practice forbidden by *King v. Smith*, 392 U.S. 309 (1968). There, the Supreme Court invalidated Alabama's "substitute father" regulation, which denied AFDC payments to children whose mother cohabited in or outside her home with an able-bodied man. An example of the attribution of non-existent resources to a family applying for AFDC, the regulation required the denial of benefits without any inquiry into whether the man was the children's father and had an obligation to support the children or did, in fact, do so. The Supreme Court struck down the regulation as inconsistent with federal statutory intent to provide aid to children deprived of the support or care of a parent who was legally obligated to support them. What once was a state aberration has now become national law. Under DEFRA's presumption of availability, an absent father paying child support to his child becomes the *de facto* provider for all children living with his child's mother.

Traditional notions of responsibility are radically revised by the DEFRA/SFU system. Fathers who are financially able to support their child and who recognize their obligation to do so are irrationally penalized and undoubtedly confused when their monetary contribution to the child's upbringing is commandeered by the state. Mothers in the affected families are similarly bewildered when the state effectively asks them to choose between the equally compelling rights and expectations of their children. Such mothers justifiably question why one set of children in the family must suffer for the others to survive. Were the children receiving child support able to represent their own interests and raise their own voices in protest against the SFU system, they too would wonder why one child in a family must suddenly be involuntarily thrust into the role of provider for the other members of the family.

F. Though The Reduction Of Governmental Deficits Is An Important Objective Worthy Of Legislative Attention, The Constitution Should Not Permit Family Duties To Be Destroyed So That Federal Dollars Can Be Saved.

A long line of legal authority supports the proposition that government can interject itself in family life and alter members' most intimate arrangements only when armed with a compelling justification and an appropriately tailored instrument of intervention. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Families, poor and rich alike, are our nation's foundation, and irreplaceable resource which cannot be traded away to reduce the national debt. Children

are a similarly invaluable national asset. Ironically here, lawmakers' and voters concern about escalating deficits has intensified as a result of the perception that these deficits threaten to rob future generations of economic security. Legislators' desire to avoid the prospective economic harms to generations of children, some not yet born, does not erase the present property and associational rights of the children in the families affected by the SFU regulations. The Constitution's consistent recognition and protection of family associational rights prevent the state and federal governments from using children's unchosen membership in a family that includes AFDC dependent half-sisters and brothers as the justification for the deprivation of property. For the injured children and their relatives, the price of reducing federal deficits should not be legislated sacrifice of property rights or family life.

IX. THE RELIEF THAT IS DUE

Plaintiffs are entitled to full relief.

Both state and federal defendants should be enjoined from further enforcement of DEFRA/SFU income attribution regulations. State agencies should no longer require an AFDC applicant with a child who receives child support income to assign that child's child support rights to the state in order to obtain AFDC for the applicant's remaining children. The federal government should no longer require state officials to do so. State defendants should be ordered to pay retroactive AFDC benefits to all families in North Carolina whose benefits were denied, reduced or terminated as a result of the enforcement of the SFU regulations. State defendants are en-

titled to appropriate relief in their cross-action against federal defendants.

Retroactive benefits are properly available in this case. Unlike *Edelman v. Jordan*, 415 U.S. 651 (1974), where, at the time a constitutional violation was found, state officials were under no court imposed obligation to conform to a different standard, the state here was still acting under the restrictions imposed by this court's earlier injunction, which forbade the involuntary attribution of child support income to a family in which some children received adequate child support income and some received only AFDC. That injunction still binds the state defendants as it has not been stayed, vacated or reversed. *Pasadena City Board of Education, supra.* The state defendants did not seek relief from the provisions of the original injunction by formal motion until after plaintiffs filed for further relief, nine months after the SFU regulations had been put into operation in contravention of this court's earlier injunction.

Although the legislative and federal regulatory background changed due to the passage of the DEFRA amendments and the promulgation of the implementing regulations, the state was not thereby absolved of its duty to seek relief from the outstanding injunction before acting in direct violation of it. State defendants were aware of the conflict between the anticipated SFU regulations and this court's outstanding order. On August 22, 1984, the North Carolina Division of Social Services, Planning and Information Section, issued a memorandum that stated:

> The effect of this law on *Guilliard* [sic] will depend on whether or not the new law supercedes the court order. If it does, *Guilliard* would be

> voided. If not, the State would be placed in much the same position as exists in *Alexander v. Hill*, i.e., either comply with a court order and lose compliance with Federal regs, or vice versa. If the State chose the court order in such a situation, the state would be responsible for AFDC payments to such cases.

Despite its own cognizance of perceived conflicting obligations, not completely unlike those to which the movant mothers are subjected under the SFU regulations, the state chose to defy the operative injunction and did not return to court for a ruling on the apparent conflict.

When the state defendants began to deny AFDC applications and to reduce or terminate benefits under the SFU regulations, they were still obligated under court order to provide such benefits, regardless of whether or not a caretaker/applicant had assigned the child support rights of selected children to the state. As cogently explained in *Daubert v. Percy*, 713 F.2d. 328, 329-330 (7th Cir. 1983):

> "Not every award of retroactive monetary relief payable from a state treasury violates the Eleventh Amendment. Had the Secretary chosen to defy the 1973 injunction instead of moving for relief from it, the district court could have held him in contempt and ordered him to pay from the state treasury benefits that had already accrued. *Hutto v. Finney*, 437 U.S. 678 [1978] . . . Ordering a state to pay benefits that it had been required to pay . . . is no more disruptive of its budget process than is asking it to pay a civil contempt fine . . . ."

X. CONCLUSION

Plaintiffs are entitled to relief as above indicated, and to costs and attorney fees. They will tender appropriate orders and serve them on all other counsel.

State defendants are entitled to appropriate relief in their cross-action against federal defendants. They will tender appropriate orders and serve them on all other counsel.

This 6 day of May, 1986.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. 2660

BEATY MAE GILLIARD; ET AL.

v.

PHILLIP J. KIRK, Sec., N.C. Department of Human Resources, et al. defts. and OTIS R. BOWEN M.D. Sec. of U.S. Dept. of Health and Human Services.

[Filed July 14, 1986]

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment is hereby entered in accordance with the Final Order of this court filed the 3rd day of July, 1986.

Date July 14, 1986

THOMAS J. MCGRAW
Clerk

/s/ Mildred L. Leazer
MILDRED L. LEAZER
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

Civil Action No. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS

v.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY MCCARTY, Chairman, North Carolina Social Services Commission, in his official capacity, DEFENDANTS-THIRD PARTY PLAINTIFFS

v.

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services, in his official capacity, THIRD-PARTY DEFENDANT

[Filed July 29, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the Third-Party Defendant, Otis R. Bowen, hereby appeals to

the Supreme Court of the United States from the final Order entered in this action on July 3, 1986 and the final judgment entered on July 14, 1986.

The appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

This the 29th day of July, 1986.

CHARLES B. BREWER
United States Attorney

/s/ Charles E. Lyons
CHARLES E. LYONS
Assistant United States
Attorney

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS

v.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY MCCARTY, Chairman, North Carolina Social Services Commission, in his official capacity, DEFENDANTS-THIRD PARTY PLAINTIFFS

vs.

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services, in his official capacity, THIRD-PARTY DEFENDANT

[Filed Sept. 16, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the Third-Party Defendant, Otis R. Bowen, hereby appeals to the Supreme Court of the United States from the final Order entered in this action on July 3, 1986, the

final judgment entered on July 14, 1986, and the Order entered on August 25, 1986, denying the motions for reconsideration.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

This the 16th day of September, 1986.

CHARLES B. BREWER
United States Attorney

/s/ Charles E. Lyons
CHARLES E. LYONS
Assistant United States
Attorney

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

Civil Action No. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS

v.

PHILLIP J. KIRK, JR., Secretary the Department of Human Resources In His Official Capacity, and C. BARRY MCCARTY, Chairman, Social Services Commission, In His Official Capacity, DEFENDANTS AND THIRD-PARTY PLAINTIFFS

v.

OTIS R. BOWEN, Secretary, United States Department of Health and Human Services, in his official capacity, THIRD-PARTY DEFENDANT

[Filed Aug. 25, 1986]

ORDER

Upon consideration of the Motion of the State Defendants for a Stay Pending Appeal and with the consent of the Plaintiffs, the Court now STAYS its

Final Order of July 3, 1986, except as specified herein:

1. State Defendants are required, within sixty (60) days of the date of this Order, to identify all members of the plaintiff class as defined in paragraph 1 of the Final Order of July 3, 1986. Upon identification of members of the class, State Defendants shall file with the court a list of all persons identified, including each person's name, address, and the effect of the standard filing unit on the case (denial, reduction, termination or involuntary inclusion of a child in AFDC unit). A copy of this list shall be provided to counsel for the Plaintiffs. Upon identification of members of the class, State Defendants shall send a Notice to these persons alerting them to the possibility of retroactive benefits. This Notice shall substantially conform to Exhibit A attached. For purposes of identifying the persons to receive this Notice, the court will presmue that a child was involuntarily included in the budget unit if the child support paid for a month exceeds the $50 disregard plus the incremental increase in the AFDC grant caused by the addition of that child to the unit.

2. Beginning thirty (30) days from the date of this Order, the State Defendants shall provide a Notice to those AFDC applicants or recipients whose benefits are denied, reduced or terminated as a result of the involuntary inclusion in the AFDC budget unit of a child receiving child support and to those AFDC recipients who involuntarily included a child receiving child support in the AFDC budget unit, but who continue to receive AFDC. This Notice shall be sent at the time a person is identified as being a potential class member, which may occur at the time of disposition of the case, at the time a child support ob-

ligation is established or at the time of any other event which triggers membership in the class. For purposes of identifying the persons to receive this Notice, the court will presume that a child was involuntarily included in the budget unit if the child support paid for a month exceeds the $50 disregard plus the incremental increase in the AFDC grant caused by the addition of that child to the unit. This Notice shall substantially conform to Exhibit B attached. The county shall document in the case file that the person was identified as a potential *Gilliard* class member, and the date on which the Notice was sent.

Every ninety (90) days, the State Defendants shall file with the Court a list of persons provided this Notice, including each person's name, address and the nature of the effect of the standard filing unit rule (denial, reduction, termination or involuntary inclusion of a child in the AFDC unit). A copy of this list shall also be provided to Plaintiffs' counsel.

3. This Court is mindful of the number of months which have elapsed since the state implemented the Standard Filing Unit rule and the number of months which may elapse prior to final resolution of this case. Procedures to verify AFDC requirements shall be developed in order to facilitate a month-by-month reconstruction of eligibility. These procedures shall be reasonable and consistent with the realities of making retroactive payments. These procedures shall be developed to assure that eligible persons will receive payment under the Final Order of July 3, 1986. These procedures shall be reviewed by plaintiffs' counsel prior to implementation.

If third-party verifications cannot be obtained, the state defendants shall not withhold or delay a pay-

ment when alternative verification (such as a written statement from the client) is available. The Federal Defendant shall not penalize the state defendants or hold them at any financial risk for issuance of any payments made pursuant to the Final Order of July 3, 1986.

4. Insofar as the State Defendants' compliance with the terms of this Order require their expenditure of administrative funds, the Federal Defendant shall be required to reimburse these expenditures at the rate of fifty percent (50%).

This the 22 day of August, 1986.

/s/ James B. McMillan
JAMES B. MCMILLAN
District Court Judge

EXHIBIT A

READ CAREFULLY! YOU MAY BE ENTITLED TO BACK BENEFITS!

At some time since October, 1984, your AFDC application was affected by the "Standard Filing Unit" rule. This means you were required to include all your children in the AFDC application whether you wanted to or not. Our records show that one or more of your children were receiving child support, and you may have wished to exclude those children from the AFDC budget unit. You were told these children had to be in the unit and you had to sign over child support to the state.

A lawsuit in Federal Court was filed on your behalf to allow you to choose which children would be in the AFDC budget unit. The judge ruled that you should not have to include the children receiving child support in the AFDC unit unless you want to. The case has been appealed to the United States Supreme Court.

If the United States Supreme Court rules in your favor, you may be entitled to back benefits. In order to obtain these benefits, you will have to show the Department of Social Services that you are eligible for them. You will need to show them your income, who was living in your household and other items as far back as October, 1984 in order to get benefits. It may be more than a year before the Supreme Court decides the case.

If you have kept records about your earnings, child support paid, the persons in your household, etc., *do not throw them away!* If you have thrown them away, try to get copies of them from your em-

ployers, the court house or other places. Keep them in a safe place. In addition, you should do the following things:

1. Keep the Department of Social Services informed of your current address, even if you move to another state.
2. Keep ongoing records of all household income, such as wages, child support, etc.
3. Keep ongoing records of who lives in the household.
4. Keep all records in a safe place and do not throw them away.

You will receive further notice at the conclusion of the lawsuit if you are eligible for extra benefits.

If you have questions about this notice, call your county Department of Social Services, your local Legal Services office or CARELINE, toll free, at 1-800-662-7030.

Distribution:
original to client
copy to case file

Eligibility Worker

Date _____

EXHIBIT B

READ CAREFULLY! YOU MAY BE ENTITLED TO BACK BENEFITS!

During your recent application for AFDC, you were required to include all children living with you in your budget unit. You may have wished to leave out one or more of these children because they were receiving enough child support. If you had been permitted to leave out certain children, you may have been able to keep their child support and still get AFDC for your other children.

A lawsuit in Federal Court was filed on your behalf to allow you to choose which children would be included in your AFDC unit. The judge ruled that you should not have to include the children receiving child support in the AFDC application unless you want to. The case has been appealed to the United States Supreme Court.

If the United States Supreme Court rules in your favor, you may be entitled to some back benefits. It may be more than a year before the Supreme Court make a decision, however. In order to preserve your right to benefits, you should do the following things:

1. Keep the Department of Social Services informed of your current address, even if you move to another state.
2. Keep ongoing records of all household income, such as wages, child support, etc.
3. Keep ongoing records of who lives in the household.
4. Keep all records in a safe place and not throw them away.

You will receive further notice at the conclusion of the lawsuit if you are eligible for extra benefits.

If you have questions about this notice, call your county Department of Social Services, your local Legal Services office or CARELINE, toll-free, at 1-800-662-7030.

Distribution:
original to client
copy to case file

Eligibility Worker

Date

APPENDIX G

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD, LORETTA GILLIARD; THOMAS GILLIARD; DANA GILLIARD; GREGORY GILLIARD; REGINALD GILLIARD; and SAMUEL DAVIS JR. GILLIARD, minors, by their mother, and next friend, BEATY MAE GILLIARD, on behalf of themselves and all others similarly situated, PLAINTIFFS

—vs—

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY MCCARTY, Chairman, North Carolina Social Services Commission, in his official capacity, DEFENDANTS AND THIRD-PARTY PLAINTIFFS

—vs—

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services, THIRD-PARTY DEFENDANT

[Filed Aug. 25, 1986]

ORDER

Motions filed by the state defendants and by the federal third party defendant ask this court to reconsider its decision in this case in light of *Lyng v. Castillo*, 54 U.S.L.W. 4864 (June 27, 1986). In *Lyng*, the Supreme Court determined that the federal food stamp program's determination of eligibility and benefit levels on a household rather than an individual basis was constitutional. The statutory distinction between parents, children and siblings and all other groups of individuals had been challenged as a violation of the equal protection elements of the Due Process Clause of the Fifth Amendment. However, the Supreme Court found that it was reasonable to distinguish between parents, children and siblings and all other more distantly related relatives living in a group. To the Supreme Court, this distinction was based on rational congressional assumptions about family living patterns and did not "directly and substantially" interfere with family living arrangements, thereby burdening a fundamental right.

Lyng does not control this case and does not necessitate reconsideration or revision of this court's previous conclusions regarding the constitutionality of the SFU/DEFRA plan.

First, *Lyng* focused on the claims of persons challenging the diminution or elimination of a government benefit. The case before this court addresses the clearly distinguishable claim of a different group, persons whose private property, child support, has been taken by the government as a condition of other children's eligibility for government benefits. (See

discussion of this distinction at pp. 55-56 of this court's memorandum of decision.) Although governmental action affecting eligibility requirements and benefits levels in government entitlements programs generally receives the minimal scrutiny review, action affecting private property has traditionally been subjected to a more demanding examination as it was in the present case.

This case can also be distinguished from *Lyng* due to the severity of the deprivation imposed and that deprivation's documented effect on family associational rights. In terms of the deprivation, this case appears to bear a greater resemblance to *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) than to *Lyng*. In summarizing the *Moreno* decision in footnote 3 of the *Lyng* opinion, the Supreme Court wrote that *Moreno*:

> . . . held that the definition of the term "household" in the Food Stamp Act as amended in 1971, 84 Stat. 2048, was unconstitutional. That definition drew a distinction between households composed entirely of persons who are related to one another and households containing one or more members who are unrelated to the rest. Unlike the present statute, the 1971 definition *completely disqualified* all households in the latter category. Not only were all groups of unrelated persons ineligible for benefits, but even groups of related persons would lose their benefits if they admitted one nonrelative to their household. We concluded that this definition did not further the interest in preventing fraud, or any other legitimate purpose of the Food Stamp Program. [Emphasis added.]

Like the classication invalidated in *Moreno*, the SFU/DEFRA plan renders an entire family ineligible for

needed benefits. Here, the family will receive no money if one half-sibling has a separate source of income in the form of child support and that child lives with a mother or caretaker who refuses to assign the child's income to the state.

In *Moreno*, the Supreme Court wrote:

> . . . in practical operation, the 1971 amendment excludes from participation in the food stamp program, *not* those persons who are "likely to abuse the program" but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.

413 U.S. at 538 (emphasis in original). Analogously here, the children penalized by the implementation of the SFU regulations are persons who are not free to change their living arrangements to preserve or augment their income and for whom such a change might be detrimental to their overall well-being. Neither set of children, those with child support income and those who are totally dependent on AFDC, should be faced with a choice between parental relationships and financial survival. Thus, the nature of the deprivation and that deprivation's effect on family autonomy differentiate this case from *Lyng* and render *Lyng*'s analytical framework inapplicable to this controversy.

The motions of the state defendants and the federal third party defendants for reconsideration are therefore DENIED.

IT IS SO ORDERED, this 22 day of August, 1986.

/s/ James B. McMillan
JAMES B. MCMILLAN
District Court Judge

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Supreme Court, U.S.
FILED
NOV 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2) (4)

Nos. 86-509 and 86-564

In The

Supreme Court of The United States

October Term, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

v.

BEATY MAE GILLIARD, et al.,

Appellees.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, et al.,

Appellants,

v.

BEATY MAE GILLIARD, et al.,

Appellees.

On Appeals From The United States District Court For The Western District of North Carolina

MOTION TO AFFIRM

JEAN M. CARY
Civil Legal Assistance Clinic
UNC School of Law
Chapel Hill, NC 27514
(919) 962-4107

J. LeVONNE CHAMBERS
ERIC SCHNAPPER
NAACP Legal Defense Fund
16th Floor
99 Hudson Street
New York, NY 10013

JANE R. WETTACH*
East Central Community Legal Services
Suite 600
5 West Hargett Street
Post Office Drawer 1731
Raleigh, NC 27602
(919) 828-4647

LUCIE E. WHITE
1709 Dilworth Road
Charlotte, NC 28203
(704) 372-8645

* Counsel of Record

Counsel for Appellees

34 pp

QUESTIONS PRESENTED

1. Does Section 402(a)(38) of the Social Security Act authorize state officials to require non-needy children to become welfare recipients and forfeit their child support in order for their indigent half-siblings to receive Aid to Families with Dependent Children?

2. If Section 402(a)(38) of the Social Security Act does authorize such action on the part of the state officials, is such a procedure unconstitutional?

3. Where state officials knowingly and deliberately violate a valid federal injunction, does the Eleventh Amendment preclude the federal courts from ordering state officials to return funds improperly taken or withheld in violation of that injunction?

4. Should Hans v. Louisiana, 134 U.S. 1 (1890), be overruled?

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Nos. 86-509 and 86-564

Supreme Court of The United States

October Term, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

v.

BEATY MAE GILLIARD, et al.,

Appellees.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, et al.,

Appellants,

v.

BEATY MAE GILLIARD, et al.,

Appellees.

MOTION TO AFFIRM

The jurisdictional statements in these appeals raise two distinct sets of issues, only one of which warrants plenary consideration by this court.

The first issue, raised by both the federal and state appellants, concerns the meaning and constitutionality of section 402(a)(38) of the Social Security Act. Appellees agree with the decision of the District Court that section 402(a)(38), as construed by that court, is unconstitutional. Because, however, the questions raised by appellants as to the meaning and validity of section 402(a)(38) are not

unsubstantial, we agree that the Court should note probable jurisdiction in the federal appeal, and as to question number 1 in the state appeal.

The state also seeks review of a 1986 order of the District Court directing the state to return funds unlawfully taken or withheld from appellees in violation of a 1971 injunction issued by that court. Because that aspect of the 1986 order is clearly correct, and does not turn on the construction or validity of section 402(a)(38), appellees move, pursuant to Rule 16, that the relevant portion of that order be summarily affirmed.

STATEMENT OF THE CASE

A. Summary of The Proceedings

In 1971, the District Court for the Western District of North Carolina entered a classwide injunction which prohibited the state from reducing Aid to Families with Dependent Children (AFDC) payable to eligible children by the amount of legally-restricted child support income received by another child in the household. The District Court decision was affirmed by this Court. Gilliard v. Craig, 331 F. Supp. 587 (1971) aff'd without opinion, 409 U.S. 807 (1972). In October, 1984, without returning to the District Court to ask that the injunction be lifted, the defendants adopted a policy in direct violation of the injunction. Members of the plaintiff class moved for enforcement of the injunction in May, 1985.

The state defendants, Phillip J. Kirk, Secretary of the North Carolina Department of Human Resources and C. Barry McCarty, Chairman of the North Carolina Social

Services Commission, did not move for Relief from Judgment until July, 1985, finally asking the court to relieve them from the terms of the injunction on the grounds that newly-issued regulations of the U.S. Department of Health and Human Services required the implementation of the resurrected income-counting policy. They filed a Third-Party Complaint against Secretary Bowen asking that the federal government share in any liability they suffered as a result of the violation. The Secretary responded that his new regulations were required by an amendment to the Social Security Act, Section 402(a)(38), passed as part of the Deficit Reduction Act of 1984 (DEFRA).

In May, 1986, the District Court held that the state was in violation of the 1971 injunction and denied its Motion for Relief from Judgment. Pursuant to the plaintiff's Motion for Further Relief, the court ordered the state to pay to the class members all the monies withheld as a result of the violation of the order. In addition, the court refused to lift the injunction prospectively, finding that the statute relied on by the state effects a taking of property without just compensation. The court also held that the statute violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Gilliard v. Kirk, 633 F. Supp. 1529 (W.D.N.C. 1986).

B. Statutory and Regulatory Framework

Aid to Families with Dependent Children (AFDC) is a joint state-federal program authorized by the Social Security Act to provide financial assistance to needy depen-

dent children and their caretaker relatives. 42 U.S.C. § 601 et seq.; Heckler v. Turner, 470 U.S. 184 (1985). The federal government reimburses participating states for a portion of the funds they expend on eligible recipients; in turn, the states must administer their assistance programs pursuant to state plans in conformity with applicable federal statutes and regulations. Id. Children eligible to receive AFDC benefits are those who are deprived of the support or care of at least one parent and who meet the financial need criteria. 42 U.S.C. § 606(a).

Prior to the passage of the Deficit Reduction Act in 1984, a parent applying for AFDC could designate which of her children needed assistance. The state agency counted all the income and resources of the persons claiming aid in determining their financial need for assistance. 42 U.S.C. § 602(a)(7). In considering that income and resources, the state allowed certain exemptions and deductions and determined the monthly countable income of those applying for benefits. If that income was less than the state's payment standard, the applicants were eligible for AFDC assistance.[1]

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[1] The Jurisdictional Statement of the federal appellants incorrectly states at page 3 that the amount of benefits paid to the family is based upon the difference between the family's income and [the standard of need.] The state sets a "standard of need" to reflect its judgment of the minimum subsistence level in the state. 42 U.S.C. § 602(a)(23). The AFDC payment in North Carolina is fifty percent of the standard of need. See 1985 N.C. Sess. Laws Chapter 479. Thus, the AFDC payment is the difference between the unit's income and fifty percent of the state's minimum subsistence level.

A parent's option to exclude certain children from the welfare grant was particularly important in households containing children of different fathers. When the father of a particular child provided adequate support for him, the child would not need public assistance. Because his needs were taken care of, he would not be a member of the welfare grant nor would his income and resources (i.e. his child support) be considered in the determination of the needs of the other children claiming aid. This allowed the mother to act consistently with state law, which requires her to use child support exclusively for the benefit of the child for whom it was paid. See N.C. Gen. Stat. § 50-13.4; Goodyear v. Goodyear, 257 N.C. 374 (1962).

The Deficit Reduction Act of 1984 included an amendment to the Social Security Act affecting this system. The amendment requires that a state AFDC plan must:

> (38) provide that in making the determination under paragraph (7) [42 U.S.C. § 602(a)(7)] with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) [42 U.S.C §§ 601 et seq.] include -
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 406(a) [42 U.S.C. § 606(a)], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 205(j) [42 U.S.C. § 405(j)], in the case of

> benefits provided under title II [42 U.S.C. §§ 401 et seq.];

Pub. L. No. 98-369, § 2640, 98 Stat. 494, 42 U.S.C. § 602 (a)(38). With its many cross references and complex construction, this section's meaning has engendered much dispute.[2] Secretary Bowen of the United States Department of Health and Human Services and Secretary Kirk of the North Carolina Department of Human Resources have interpreted this statute to require what they call "the standard filing unit." The federal regulations provide:

> For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:
>
> (A) Any natural or adoptive parent...; and...
> (B) Any blood-related or adoptive brother or sister.

45 C.F.R. § 206.10(a)(1)(vii) (1985). The state regulations are similar:

> Standard Filing Unit
>
> A. The parent and all minor children who are brothers and sisters, including half-brothers and sisters, and who are living together must be included in the same assistance unit unless:

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[2] See, e.g., Gorrie v. Heckler, 624 F. Supp. 85 (D.Minn. 1985) appeal pending, No. 85-5394-MN (8th Cir.); White Horse v. Heckler, 627 F. Supp. 848 (D.S.D. 1985) appeal pending, Nos. 85-5005, 85-5006SD (8th Cir.); Johnson v. Cohen, No. 84-6277 (E.D. Pa. Jan. 10, 1986) appeal pending; Nos. 86-1101, 86-1107, 86-1149 (3d Cir.); Maryland Dept. of Human Resources v. United States Dept. of Health and Human Services, Nos. M-86-605, M-86-604 (D. Md. Apr. 22, 1986) appeals pending, Nos. 86-3076, 86-3083 (4th Cir.).

1. The parent or child is an SSI recipient, or
2. The parent or child does not meet all eligibility factors with the exception of income and reserve. Do not exclude a parent or child because of the amount of income or reserve he has.

Section 2360 III A, North Carolina AFDC Manual.

In other words, the two Secretaries have interpreted the amendment, which by its literal terms requires only that the income and resources of these co-resident siblings be "considered" in the determination of the financial need of the dependent child claiming aid, to require these others to be a part of the AFDC application unit. The standard filing unit policy thus draws into the welfare system a whole group of children who were formerly excluded because their needs were being met by one or both parents.

Having subsumed these supported children into the AFDC unit, the defendants then require of them all that they require of AFDC recipients. Among these requirements is the requirement that all rights to child support be assigned to the state as a condition of AFDC eligibility. 42 U.S.C. § 602(a)(26)(A). This is how the deficit reduction is accomplished. By requiring children who have adequate support to join the welfare system, the defendants capture this support. Since the amount paid out in AFDC benefits for these additional children is considerably less than what the children pay in through their assignment,

actual government expenditures are reduced.[3]

C. Summary of The Facts

The five class members who filed the 1984 Motion for Further Relief submitted affidavits presenting examples of the operation and effect of the standard filing unit rule. Dianne Thomas is the mother of two children, Crystal and Sherrod, who each have a different father. Prior to the implementation of the standard filing unit rule, Ms. Thomas received AFDC of $194 per month for Crystal. Pursuant to an agreement between Ms. Thomas and Sherrod's father, she received $200 per month in child support for Sherrod and no AFDC. In October, 1984, the AFDC office informed Ms. Thomas that her AFDC for Crystal would be terminated unless she filed a new application which included both children. She was told that as part of the new application, she would have to assign Sherrod's child support rights to the state, and she would be entitled to an AFDC grant of $223 for both children. Fifty dollars of the support collected on his behalf would be returned to Sherrod and the state would keep

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[3] The government does not save the full amount of the child support because there is a small incremental increase in the AFDC payment when the child is added and $50 in child support is disregarded as countable income. 42 U.S.C. § 657(b)(1). For example, a North Carolina family with three children and a single parent currently receives $269 per month in AFDC benefits. If a fourth child were required to be added to the unit, the incremental AFDC increase would be $25. If that fourth child were receiving $200 per month in child support and assigned it to the state, the government savings would be $125 - the AFDC grant would be increased to $294, but it would be offset by $150 of the $200 in support received. Whereas the government was spending $269 a month for the three-child household, it would now be spending just $144 for the four-child household.

the rest. The consequence for Ms. Thomas would be that from having $394 available to support her two children, she would have only $273.

Ms. Thomas initially refused to add Sherrod to the AFDC unit because of violent objections from Sherrod's father to having his son put on welfare. Consequently, Crystal's AFDC was cut off. Several months later, however, Ms. Thomas was facing utility terminations and was unable to purchase clothing and other necessities for Crystal. She felt she had no choice but to again apply for AFDC, and submit to the requirement that she add Sherrod to the application and assign his rights to child support to the state. Upon learning of Ms. Thomas's decision to put his child on welfare, Sherrod's father stopped paying the support he had been regularly providing, and stopped his regular visitation with his son. Sherrod developed behavioral problems and his school performance declined, both of which his mother attributed to his father's withdrawal from him. With the support rights assigned, the county sued Sherrod's father for support; a court order now requires him to pay $87 per month to the Clerk of Court. See Memorandum of Decision, Jurisdictional Statement of Kirk et al., A-13 thru A-17 (hereinafter, State J.S.).

Mary Medlin has four children. No legal paternity has been established for the two older boys, and they have never received child support. Bobby Harrington is the father of 10-year-old Karen, and prior to the operation of the standard filing unit, had signed a Voluntary Support

Agreement pursuant to which he was paying $200 per month as support for her. James Richardson, the father of one-year-old Jermaine, voluntarily supported his child pursuant to an oral agreement with Ms. Medlin. He purchased necessities for his child, paid a portion of Ms. Medlin's household bills and provided $50 a month in cash support. Thus, Ms. Medlin supported the two older boys with AFDC and the two younger children with their support.

When the standard filing unit went into effect, the AFDC was terminated because the support for the two younger children exceeded the potential AFDC payment for the four-child unit required by the standard filing unit rule. Unable to make ends meet and facing objections from the two supporting fathers that their money was being used to support children for whom they had no duty, Ms. Medlin reluctantly agreed to transfer custody of her daughter Karen to Mr. Harrington so that the girl could be properly supported. The remaining three children then became eligible for an AFDC grant. Because Jermaine was included as an AFDC recipient, though, Ms. Medlin had to assign his support rights to the state. Jermaine's father, Mr. Richardson, was then asked by the county (which carries out the state child support collection) to agree to pay $165 per month through the Clerk of Court's office instead of providing direct support. In response to Mr. Richardson's questioning, the county agent confirmed that only $50 of that $165 would go directly to his son, and the remaining $115 would be retained by the state to offset its AFDC expenditures for Jermaine and his

half-brothers and sisters. Mr. Richardson refused to agree to such an arrangement, because he wished to continue supporting his son directly and did not think he should be required to support the others. The state then brought a criminal action for non-support against him. He eventually agreed to pay $139 in child support through the Clerk of Court's office to avoid a criminal conviction. Id. at A-17 A-20.

The other appellees present similar cases. The father of two of the five children of Arvis Waters is ordered to pay support in the amount of $193 per month by the Family Court of New York; his wages are garnished to assure regular payments. The father of her other three children provides no support and Ms. Waters had received AFDC for just those three prior to the implementation of the standard filing unit. To avoid having no income at all for the older three, Ms. Waters was forced to put them all on the welfare grant after October, 1984. The supported children saw their income drop by 25 percent. Suddenly, their mother was unable to afford proper shoes, diapers or cab fare to the health clinic. Because New York collects several months of support before mailing it to North Carolina, and North Carolina pays only one "$50 disregard" for each lump sum received, the children are often deprived of even this small portion of their support. Thus, Ms. Waters frequently has just a welfare check to support all her children, despite the $193 in support that is being paid. Id. at A-22 thru A-28.

Diane Jefferys, mother of four, suffered like difficulties. Her husband and father of two of her children had been paying $204 each month in support pursuant to a local court order and Ms. Jefferys received AFDC of $223 per month for her other two children. When the standard filing rule was imposed on the family, the support was assigned to the state and the whole group was included in the $294 AFDC check. Mr. Jefferys stopped paying support because of his objections to the assignment of his support to the state. The resultant drop in income led to the family's eviction, and a significant drop in their already meager standard of living. Id. at A-28 thru A-30.

The fifth appellee, Joyce Miles, experienced the same sort of financial decline for her supported children. When her two teen[illegible] girls lost the court-ordered support of their father, [illegible]r mother became unable to buy clothing, shoes and other items she had formerly been able to afford for them from the child support they received. Their inclusion in the AFDC unit reduced them to a welfare-level standard of living (i.e., at fifty percent of the state standard of need, see note 1, supra) rather than the higher standard they had enjoyed when they were the recipients of the support paid by their father.

The experiences of these families demonstrate clearly the effects of the standard filing unit rule. By forcing non-needy children into the AFDC assistance unit and taking their child support through the assignment system, AFDC

expenditures for needy children are reduced by the child support of the non-needy children. If the child support for one child in the unit exceeds the maximum grant amount for the whole unit, the assistance is terminated for everyone, even though there may be several children whose absent parents provide no support and who have no other income. The rule applies despite court orders and contracts requiring that the child support be used solely for the benefit of a particular child. The rule applies despite the actual use of the child support for the individual needs of the child for whom it is paid. And finally, the rule applies despite the wishes of both parents that a child remain independent of welfare.

D. The 1986 District Court Decision

The District Court viewed North Carolina's implementation of the standard filing unit rule to be a clear violation of the 1971 injunction. The 1971 injunction explicitly forbade the involuntary attribution of child support income to a family in which some children received adequate child support income and some received only AFDC. "When the state defendants began to deny AFDC applications and to reduce or terminate benefits under the SFU regulations, they were still obligated under court order to provide such benefits, regardless of whether or not a caretaker/applicant had assigned the child support rights of selected children to the state," the court stated. Memorandum of Decision, State J.S. at A-79. The change in the legislative and federal

regulatory background due to the passage of the Deficit Reduction Act did not absolve the state "of its duty to seek relief from the outstanding injunctions before acting in direct violation of it." Id. at A-78. As a result of this finding, the court ordered the state defendants to pay to all affected class members the benefits they would have received but for the state's actions in defiance of the 1971 injunction. The court held that the Eleventh Amendment did not relieve the state of its obligation to pay the plaintiffs the benefits withheld.

Having found the state to have acted in violation of its past orders, the court examined the statutory and regulatory changes to determine if the state should be given prospective relief from the injunction. The court found that it should not. Although urged by the plaintiffs to read the statute to avoid the constitutional dilemmas it presents, the court was unable to find textual or historical support for the argument that Congress intended for the income of the siblings of the AFDC children to be counted as income only if it could legally be and were actually being shared. It found instead that Congress acted on the basis of a legislative presumption that the child support paid for one child in the family is actually and legally available to all the children in the household.

In order to make this legislative presumption effective, the court ruled, Congress must have pre-empted "that portion of state child support laws that makes the child

support money the exclusive property of the child in whose name the child support order was issued or in whose name the money was voluntarily delivered." Id. at A-40. Unless this were the case, the state would be requiring an AFDC mother to violate the state's child support laws in order to obtain AFDC for her other children. Id. at A-44.

This pre-emption of the state's child support laws results in a distinct loss of private property by the supported child. "The selective pre-emption of state law," the court held, "represents an unconstitutional taking that deprives the children of their entitlement to child support simply because they live with a needy mother and half-siblings." Id. at A-54. Before the standard filing unit amendment went into effect, the affected children had claim to the entire amount of the child support paid for them. As a result of its enactment, however, the children lose the unrestricted access to the money. They must make it available to their brothers and sisters through the assignment system, and retain the unqualified claim to only $50 of the money.

The District Court rejected the argument of the defendants that there can be no taking because AFDC is a voluntary program. The court recognized that the child subject to the loss makes no independent choice to participate in the program, as his inclusion in the AFDC unit is automatic if his caretaker applies for AFDC for needy half-siblings. The mother's options are illusory, at best,

as her choice to preserve the rights to child support of one child cuts her other children off from their sole source of support, AFDC.

In addition to analyzing the statute as pre-empting state law and thereby accomplishing a taking of private property, the court examined the statute from an alternative premise: that Congress had not accomplished a pre-emption. Even if there were no pre-emption, the Court ruled, the statute offends both the Equal Protection and Due Process Clauses of the Constitution. These constitutional violations arise because of the government's direct interference with the private property of certain children based on their family living arrangements. It is not all recipients of child support who must surrender their income to reduce the federal deficit, the court found, it is only those recipients who live in a household with needy children who rely on AFDC for their survival. The court distinguished this classification, which causes a loss of private property to non-welfare recipients from a classification representing a government choice among different groups of needy individuals all requesting government benefits. It thus rejected the defendants' reliance on cases such as Dandridge v. Williams, 397 U.S. 471 (1970) and Schweiker v. Hogan, 457 U.S. 569 (1982). Perceiving that the interception of the private support based on a child's family living arrangements bore more resemblance to the harm redressd in Moore v. City of East Cleveland, 431 U.S. 494 (1977), the court

found direct support in that case for its imposition of a level of scrutiny more rigorous than that applied in the line of welfare cases cited by the defendants. Applying that more exacting standard to the invasive process chosen by the government to accomplish its deficit reduction objective, the court held the statute could not stand. "The Constitution's consistent recognition and protection of family associational rights prevent the state and federal governments from using children's unchosen membership in a family that includes AFDC dependent half-sisters and brothers as the justification for the deprivation of property." Id. at A-77.

Upon these findings, the court enjoined both federal and state defendants from further enforcement of the standard filing unit rule. From this ruling, both parties appealed.

ARGUMENT

A. THE COURT SHOULD NOTE PROBABLE JURISDICTION OF THE FEDERAL APPEAL AND OF QUESTION 1 OF THE STATE APPEAL.

A summary affirmance of the district court decision in this case would require all lower courts to declare Section 402(a)(38) of the Social Security Act unconstitutional. Because of the inappropriateness of invalidating an Act of Congress without full briefing and argument, this Court ordinarily notes probable jurisdiction in appeals such

as this.[4] Although appellees believe that the district court correctly disposed of the constitutional issue below, the issues presented by the federal appeal, and by question number 1 in the state appeal, are undeniably of sufficient substance and importance to preclude summary disposition. Accordingly, we believe the Court should note probable jurisdiction in the federal appeal (No. 86-506) and with regard to question number 1 in the state appeal (No. 86-564).

The issues presented by the merits of this controversy are substantially broader and more complex than suggested by the federal and state appellants. The threshold question which this Court will be required to resolve is whether section 402(a)(38) of the Social Security Act authorized or required the federal and state appellants to treat as available to an entire family all support payments made to a particular child, regardless of whether or not those support funds were in fact, or could legally be, used for the support of the entire family. The District Court construed section 402(a)(38) to mandate this constitutionally suspect practice, as have seven other district

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[4] This Court heard seven such cases in the October, 1985 term. Bowsher v. Synar, 92 L.Ed.2d 583 (1986); Bowen v. Public Agencies Opposed to Social Security Entrapment, 91 L.Ed.2d 35 (1986); Department of Treasury v. Galioto, 91 L.Ed.2d 459 (1986); Lyng v. Castillo, 91 L.Ed.2d 527 (1986); Bowen v. Owens, 90 L.Ed.2d 316 (1986); United States v. Hemme, 90 L.Ed.2d 538 (1986); Bowen v. Roy. 90 L.Ed.2d 735 (1986).

courts.[5] Another four district courts, however, have interpreted section 402(a)(38) in a manner that avoids all constitutional problems, holding that the statute authorizes officials to treat as available to an AFDC family only those child support payments which could lawfully be and were in fact used to support the AFDC family.[6]

If this Court adopts the interpretation of section 402(a)(38) accepted by the District Court in this case, the Court will be required to decide whether the statute as thus construed is unconstitutional on its face. At least four district courts, including that in the instant case, have held that section 402(a)(38) effects an unconstitutional taking or violates the Tenth Amendment, the Due Process Clause of the Fifth and Fourteenth Amendments, or the Equal

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[5] Maryland Dept. of Human Resources v. U.S. Dept. of Health and Human Services and Britt v. Bowen, Nos. M-86-605 and M-86-604 (D. Md. Apr. 22, 1986) consolidated apeals docketed, Nos. 86-3076 and 3083 (July 2, 1986, 4th Cir.) Rosado v. Bowen, No. H-85-171 (JAC) (D. Conn. Sept., 1986; Sherrod v. Hegstrom, 629 F. Supp. 150 (D. Or. 1985); Shonkwiler v. Heckler, 628 F.Supp. 1013 (S.D. Ind. 1985) Childress v. Heckler, No. 85-Z-1459 (D. Colo. Jan. 21, 1986); Baldwin v. Ledbetter, No. C85-4340A (N.D. Ga.) (Oct. 17, 1986) Lesko v. Bowen, 639 F. Supp. 1152 (E.D. Wis. 1986) appeal pending No. 86-415 (U.S.).

[6] Gorrie v. Heckler, 624 F. Supp. 85 (D. Minn. 1985) appeal pending No. 85-5394-MN (8th Cir.); White Horse v. Heckler, 627 F.Supp. 848 (D.S.D. 1985) appeal pending Nos. 85-5005, 85-5006SD (8th Cir); Lee v. Pingree, No. 85-644-Civ-T-13 (M.D. Fla. Feb. 13, 1986); Gibson v. Sallee, No. 3-85-1283 (M.D. Tenn. Mar. 6, 1986).

Protection Clause of the Fourteenth Amendment.[7] Another five district courts, on the other hand, have upheld the constitutionality of the statute in the face of such an across the board challenge.[8]

If the Court concludes that section 402(a)(38) is constitutional on its face, the Court will nonetheless have to determine whether the statute is unconstitutional as applied to the particular appellees in this case. The somewhat different circumstances of the named appellees present several distinct constitutional problems. Some appellees, such as Joyce Miles, were receiving child support as a result of judicial decrees which require that the support payments be spent only on the supported child; the actions of the defendant officials in this case, requiring Ms. Miles and others similarly situated to violate such court orders in order to obtain AFDC for their other children, offend basic due process principles. Another group of AFDC recipients, such as Arvis Waters, are subject to similar court orders from state courts outside of North Carolina; the attempts by North Carolina officials to induce violations of those out-of-state decrees raise serious questions under the Full Faith and Credit Clause. Finally,

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[7] Johnson v. Cohen, No. 84-6277 (E.D. Pa. Jan. 10, 1986) appeal pending, Nos. 86-1101, 86-1107, 86-1149 (3rd Cir.); Lesko v. Bowen, supra n.5; Baldwin v. Ledbetter, supra n.5.

[8] Maryland Dept. of Human Resources v. U.S. Dept. of Health and Human Services, supra n.5; Rosado v. Bowen, supra n.5; Sherrod v. Hegstrom, supra n.5; Shonkwiler v. Heckler, supra n.5; Childress v. Heckler, supra n.5.

class members, such as Dianne Thomas, entered into private agreements prior to October, 1984, pursuant to which the fathers involved promised to make certain support payments, and the mothers agreed in turn to expend the funds only on the specified children. State efforts clearly intended to force mothers to violate those pre-existing contractual agreements raise significant problems under the Contract Clause. Thus, even if section 402(a)(38) is held constitutional in some situations, the statute may nonetheless be ruled invalid in other circumstances.

B. QUESTION TWO OF THE STATE APPEAL IS INSUBSTANTIAL.

The District Court below found that the actions taken by the state defendants between 1984 and 1986 were not only unconstitutional, but also violated the injunction that had been issued by that court fifteen years earlier in December, 1971.[9] The 1971 injunction forbade the state defendants from withholding or reducing a family's AFDC payments because of child support payments to one child, unless the funds were "legally available to all members of the family group." State J.S. at A-110. The state appealed that injunction to this Court, which summarily affirmed it

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[9] The full text of the 1971 injunction is set forth in the State J.S. A-108 thru 112.

in 1972. 409 U.S. 807. In 1986, the District Court concluded that the state practices that had commenced in October, 1984, violated the commands of that 1971 injunction. State J.S. at A-77 thru A-80. The state did not deny in the proceedings below that it had violated the 1971 injunction, and does not seriously do so here.[10]

The district court correctly concluded that it had both the power and the duty to direct the state to return to the appellee class members funds that had been taken or withheld in violation of the 1971 injunction. In Hutto v. Finney, 437 U.S. 678 (1978), this Court held that the Eleventh Amendment did not confer upon the states a license

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10 The defendants clearly recognized that implementation of the standard filing unit rule would conflict with the outstanding injunction. In a departmental memorandum issued two months prior to the implementation of the policy, the defendants noted, "The effect of this law on Guilliard [sic] will depend on whether or not the new law supersedes the court order. If it does, Guilliard would be voided. If not, the state would be placed in much the same position as exists in Alexander v. Hill, i.e., either comply with a court order and lose compliance with Federal regulations, or vice versa." See State J.S. at A-79.

In its Jurisdictional Statement, the state suggests it was "in effect ... following the original 1971 injunction" because the purpose of the injunction was to compel obedience to the Social Security Act as then written. State J. S. at 15. The actual terms of the injunction itself, however, neither referred to nor incorporated the Act, but simply forbade in unequivocal language the income counting practice resumed by the state in 1984.

to violate with impunity injunctions issued by the federal courts:

> In exercising their prospective powers under Ex parte Young ..., federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties ... which compensat[e] the party who won the injunction for the effects of his opponent's noncompliance.... The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail.

437 U.S at 691. Hutto makes clear that a court's authority to issue a prospective injunction necessarily includes the power to correct the effects of subsequent violations of such an injunction.

Regardless of this Court's disposition of the dispute regarding section 402(a)(38), the corrective provisions of the July 3, 1986 order should be upheld. Paragraphs 4-15 of that order were based, not on the lower court's views as to the meaning and validity of section 402(a)(38), but on its holding that the state "chose to defy the operative [1971] injunction." Memorandum of Decision, State J.S. at A-79. Even if, as the appellants contend, the enactment of section 402(a)(38) has undermined the rationale of the 1971 injunction, that does not excuse state officials from their obligation to obey that earlier decree until it is stayed,

vacated, withdrawn or reversed. See Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

This Court has repeatedly held that a party which deliberately violates an injunction cannot escape the consequences of that injunction by arguing that the injunction at issue was improper or even unconstitutional. Sheet Metal Workers v. EEOC, 92 L.Ed.2d 344, 366 n. 21 (1986) and cases cited. "An injunction duly issuing out of a court of general jurisdiction ... and served upon persons made parties therein ... must be obeyed by them however erroneous the action of the court may be." Howat v. Kansas, 258 U.S. 181, 189-90 (1922). This Court has held that neither striking coal miners, Howat v. Kansas, nor civil rights demonstrators, Walker v. Birmingham, 388 U.S. 307 (1967), can escape sanctions for violating such an injunction by asserting that the injunction had been mistakenly ordered. Nothing exempts government officials from the obligation to obey an injunction with which they may disagree until and unless that injunction has been modified or rescinded.

In this case the state argues that it was entitled to pursue just such a course of deliberate defiance of the 1971 injunction because the 1971 injunction was based on the Social Security Act as it stood in that year; the state appellees ask this Court to hold that state officials were free to disregard the 1971 injunction as soon as section 402(a)(38) was adopted in 1984, and were under no obligation to petition the Court for a modification of the old

injunction. State officials in fact made no effort to seek any such modification prior to October 1984, when they began systematically to violate the decree, even though the 1984 amendment had been adopted five months earlier. Nor did the state take immediate action to request an alteration of the decree even after appellees complained to the court in May 1985 that the defendants were "in blatant disregard of ... the extant [1971] court order." Memorandum of Law in Support of Plaintiffs' Motion for Further Relief, p. 2 (May 1985). Although the state finally filed a motion for relief from the 1971 injunction, almost a year after it began to violate that order, the state has never asked either the District Court or this Court to stay the 1971 injunction while that motion is under consideration. Today the 1971 injunction remains in effect, unaltered and unstayed, and the state defendants persist, as they have for the past two years, that they have no obligation to abide by it.[11] This

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[11] The state defendants did petition the District Court to stay its Final Order of July 3, 1986 pending appeal to this Court. The District Court granted the Motion in part, allowing them to postpone compliance with the payment portions of the Order. The Notice portions were not stayed. See Order of August 25, State J.S. at A-148 thru 151. The state did not ask the District Court to stay the 1971 injunction, and the August 25 Order did not state that the 1971 injunction was stayed. If this Court were to reverse the District Court's decision regarding the constitutionality of Section 402(a)(38), the state would be free to argue on remand that its obligation to obey the 1971 injunction terminated with the August 25 stay order. Should that issue arise, it would be for the District Court to decide it in the first instance; the question of the effect of the stay is not ripe for decision in the instant appeal.

Court should summarily reject the state's suggestion that state officials, unlike all other citizens, may simply ignore orders of this Court and of a lower federal court whenever they think those orders are legally unsound.

Although paragraph 14 of the July 3, 1986 decree directs the federal defendants to pay their appropriate share of any benefits withheld in violation of the 1971 decree, Final Order, State J.S. at 127, the United States does not challenge the correctness of this order. As a practical matter, the federal defendants will be obligated to pay 67% of all AFDC benefits that were improperly withheld. See 42 U.S.C. § 603. Although the federal appellants, like the state appellants, contend that the 1971 decree should have been modified in 1984 in light of the enactment of section 402(a)(38), the Solicitor General properly declines to argue that state officials were for that reason free to simply ignore, as they did, an injunction that had earlier been fully litigated before a three-judge federal court and upheld unanimously by this Court.

The disputed portion of the July 3, 1986 decree, unlike the issues raised by section 402(a)(38), are of limited practical importance. North Carolina appears to be the only state in which there was such an injunction in effect prior to 1984. Even in North Carolina, paragraphs 4-15 of the decree will have no long-term impact, since they will apply only to individuals whose rights under the 1971 injunction were violated between October 1984 and this Court's final decision on the DEFRA issue. The only other

lower court to deal with a similar problem concluded, as did the court below, that the Eleventh Amendment permits restoration of funds taken or withheld in violation of an outstanding injunction. Daubert v. Percy, 713 F.2d 328 (7th Cir. 1983).

For these reasons, the Court should dispose summarily of the issue raised by question number 2 of the state's Jurisdictional Statement, and limit plenary consideration to question number 1. If probable jurisdiction is noted with regard to question number 2, appellees will urge the Court to overrule Hans v. Louisiana, 134 U.S. 1 (1890).

CONCLUSION

For the above reasons, the Court should note probable jurisdiction in No. 86-509, the federal appeal, and in No. 86-564, the state appeal, limited to question number 1. If the state's appeal is limited to question number 1, we would urge that the cases be consolidated for oral argument.

Respectfully submitted,

JANE R. WETTACH*
East Central Community
Legal Services
Suite 600
5 West Hargett Street
Post Office Drawer 1731
Raleigh, NC 27602
(919) 828-4647

JEAN M. CARY
Civil Legal Assistance
Clinic
UNC School of Law
Chapel Hill, NC 27514
(919) 962-4107

LUCIE E. WHITE
1709 Dilworth Road West
Charlotte, NC 28203
(704) 372-8645

J. LeVONNE CHAMBERS
ERIC SCHNAPPER
NAACP Legal Defense Fund
16th Floor
99 Hudson Street
New York, NY 10019
(212) 291-1900

Counsel for Appellees

*Attorney of Record

November 8, 1986

Supreme Court, U.S.
FILED
FEB 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-509, 86-564

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BEATY MAE GILLIARD, ET AL.

PHILLIP J. KIRK, SECRETARY OF NORTH CAROLINA DEPARTMENT OF HUMAN SERVICES, ET AL., APPELLANTS

v.

BEATY MAE GILLIARD, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

JOINT APPENDIX

JANE R. WETTACH
East Central Community Legal Services
5 West Hargett Street
Suite 600
P.O. Drawer 1731
Raleigh, N.C. 27602
(919) 828-4647
Counsel for appellees

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for federal appellant

LACY H. THORNBURG
Attorney General

CATHERINE C. MCLAMB
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
(919) 733-4618
Counsel for state appellants

Jurisdictional Statement in No. 86-509 filed September 26, 1986
Jurisdictional Statement in No. 86-564 filed September 29, 1986
Probable Jurisdiction Noted December 8, 1986

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UNITED STATES DISTRICT COURT

Civil Docket No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD, LORETTA GILLIARD; THOMAS GILLIARD, DANA GILLIARD, GREGORY GILLIARD, REGINALD GILLIARD, AND SAMUEL DAVIS, JR. GILLIARD, MINORS BY THEIR MOTHER AND NEXT FRIEND, BEATY MAE GILLIARD; ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED.

v.

CLIFTON M. CRAIG, INDIVIDUALLY AND AS NORTH CAROLINA COMMISSIONER OF SOCIAL SERVICES; NORTH CAROLINA BOARD OF SOCIAL SERVICES, A PUBLIC BODY CORPORATE; JOHN R. JORDAN, JR., MRS. THOMAS E. MEDLIN, MRS. NEIL J. GOODNIGHT, DR. BRUCE B. BLACKMON, SARAH AUSTIN, TROY H. THOMPSON AND ROBERT L. LYDAY, INDIVIDUALLY AND AS MEMBERS OF THE NORTH CAROLINA BOARD OF SOCIAL SERVICES; WALLACE H. KURALT, INDIVIDUALLY AND AS MECKLENBURG COUNTY DIRECTOR OF SOCIAL SERVICES; AND MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES.

DATE	NR	PROCEEDINGS
5-5-70	1	Fil complaint; *1a*, w/Order appointing Beatty Mae Gilliard next friend for her children, w/petition; fil and ent order that Beaty Mae Gilliard be allowed to prosecute action w/o prepayment of costs, *1b*, w/affidavit; and ent and fil order allowing Samuel Odell Davis to prosecute w/o prepayment of costs,

DATE	NR	PROCEEDINGS
		w/affidavit *1c*; 9 true-copies of s. & c. handed to US Marshal (COV6, #168) (CO V 6, #169 & 170)
5-5-70	2	Fil application for temp. restraining order, w/memorandum in support.
5-12-70	3	Fil Marshal's Return—served ROBERT LYDAY, individually and as a member of the N. C. Board of Soc. Servs., on 5/7/70.
5-13-70	4	Fil Motion to Convene Three-Judge Court.
5-18-70	5	Fil summons w/Marshal's Return—served WALLACE H. KURALT, individually and as Mecklenburg County Director of Social Services on 5-/2-70
6-1-70	6	Fil Marshal's Return—served TROY H. THOMPSON w/summons and complaint 5/12/70
6-2-70	7	Fil ANSWER of defs. KURALT and MECK. CO. DEPT. OF SOCIAL SERVICES, w/cert. of serv.
6-4-70	8	Fil ANSWER of defs CRAIG, N. C. BOARD OF SOCIAL SERVICES, and other STATE DEFTS. by Robert Morgan, Attorney General, w/cert. of serv.
6-5-70		Hearing on motion for temp. restraining order & 3-judge court motion.
6-10-70	9	Ent and fil Order (JBM)—allowing designation of a 3-judge court; disallowing pltfs. petition for temp. restraining order pending decision of 3-judge court. (CO Vol #VI, 197) Copies mailed to counsel

DATE	NR	PROCEEDINGS
6-17-70	10	Fil Notification and Request for Designation of Three-Judge Court
6-17-70	11	Ent and fil (CFH)—Designation of Three-Judge Court—Judges Craven, Jones and McMillan. Counsel for parties notified; file mailed each Judge.
7-13-70	12	Fil motion for preliminary injunction and motion for s. j. w/pltf's brief & cert. of serv. Copies to each judge; Mem. in Opposition to Absention, w/cert. of serv. Copies to each judge
8-17-70	13	Fil Motion of defs. to Dismiss, w/cert. of serv. Copies to each judge
9-8-70	14	Fil defts' response to pltfs mem. in opposition to absention, w/cert. of serv. Copies to each judge together w/true copies of motion to dismiss (above) and deft's brief.
10-26-70	15	Fil Supp. Att. to Pltfs' Brief, w/cert. of serv. Copies to 3-Judges
11-5-70	16	Fil Motion of pltf that Thomas W. Pulliam be allowed to appear for pltfs
11-5-70		Three-Judge hearing held—taken under advisement
11-6-70	17	Fil Supplement to pltfs' Brief; w/cert. of serv. copies handed to judges
11-24-70	18	Fil pltfs' motion for Court Order that defts pay pltfs. benefits they would have received but for reduction complained of. Copy to 3-judges
11-30-70	19	Fil Supplementary Exhibit to Plfts' Brief; copies to judges
12-1-70	20	Fil Stipulation to Facts; copies to judges
5-21-71	21	Fil defts Brief, w/cert. of serv.

DATE	NR	PROCEEDINGS
5-21-71		Further argument before three-judge court—taken under advisement
6-10-71	21	Fil Memorandum of Decision and Order (JBM)—Judge Craven concurring; Judge Jones dissenting Opinion #21a—payments of $217 per mo to be restored retroactive to March, 1970. Copies to Legal Aid, Mr. Cobb & Mr. Covington
12-13-71	22	Ent and fil Judgment (JBM)—in favor pltfs, granting individual relief, class relief, prospective relief, retroactive relief and etc. (CO Vol. X, #219) Copies to all attorneys *Iss JS 6*
1-28-72	23	Fil defendants' notice of appeal to the Supreme Court of the U.S., pursuant to Title 28 USCA Sec. 1253, with designation of record on appeal, with question presented by appeal: whether pltfs. are entitled to judgment that it is improper to reduce or withhold payment to AFDC beneficiaries of any funds on basis of crediting outside income or resources of one or more members of the family group. Copies to counsel, of notice.
2-11-72	24	Fil defs' Motion for Stay, w/cert. of serv.
3-20-72	25	Ent and fil order requesting Clerk of US Supreme Court to secure safekeeping of record on appeal and return it to Clerk at Charlotte upon completion of matter of appeal.

DATE	NR	PROCEEDINGS
3-21-72	26	Ent and fil order allowing defs' motion for stay. Copies mailed counsel of record.
3-21-72		Certifying record to Clerk, U.S. Supreme Court, Washington, D.C.
11-13-72	27	Fil certified copy of Judgment from U.S. Supreme Court affirming District Court's decision. Receipt acknowledged.
12-18-72		Filing record on appeal rec'd from Supreme Court this date. Acknowledged.
5-2-74	28	Fil ltr. from Wm. Woodward Webb, Associate Attorney, Raleigh, N. C., addressed to JBM, ltr. dated 5-1-74, enclosing "List A" comprising compilation of persons to whom Gilliard notices were sent and who responded for their claim and "List B" comprising compilation of those persons to whom Gilliard notices were sent but who did not respond.
8-15-74	29	Fil copy of letter, dated 7-11-74 from Mrs. Mitchiner to Robert Morgan, Attorney General, State of N. C., re persons not receiving notice.
8-15-74	30	Ent and fil order (JBM)—all six applications in question to be processed immediately, and paid immediately, if on merits claimants are entitled without regard to date of their applications; defts. to file report by 8-30-74, showing full compliance with this order or facts in detail showing why on the

DATE	NR	PROCEEDINGS
		merits (as opposed to time of filing claims) no benefits are due. Copies to all counsel. CO Vol. XVII-#38.
8-21-74	31	Fil Notice of Appeal of defs. to USCA for Fourth Circuit, appealing order entered on 8/15/74. Copies to attorneys, USCA w/$50 docket fee
8-21-74	32	Fil Motion for Stay, or in Alternative, Motion for Extension of Time within which to comply w/order of 8/15/74.
8-21-74	33	Fil Appeal Bond
8-23-74	34	Ent and fil Order (JBM)—Motion for stay not allowed—additional time to report compliance to 8-15-74 order allowed respondents to 9-15-74. True-copies to counsel
8-27-74	35	Fil pltfs' Motion in Opposition to Def's Motion for Stay or for extension of time within which to comply w/order of 8-15-74 w/Notice of Motion and Proof of Service
9-18-74		Record, in two volumes, certified to Clerk USCA (Record on Appeal)
10-17-74	36	ORDER (JBM)—defts have fully complied with all the terms of the final judgment entered on December 13, 1971. Copies to counsel
10-31-74	37	ORDER (FCCA)—appeal dismissed pursuant to Rule 42(b) of FRAP. Record returned and filed
1985		
5-30	38	MOTION FOR FURTHER RELIEF, by pltfs.—Handed to JBM

DATE	NR	PROCEEDINGS
5-30	39	MEMORANDUM OF LAW IN SUPPORT of Plaintiffs' Motion for Further Relief
6-06	40	MOTION FOR EXTENSION OF TIME by defts. to & includ. 8-5-85 to respond to pltf's. mot. for further relief—w/cs & proposed Order.
6-06	41	ORDER (JBM)—Counsel for pltfs are directed to reply to deft's motion for ext. of time immediately. CC:Attys
6-10	42	REPLY TO DEFENDANTS' MOTION FOR EXTENSION OF TIME by Pltfs.—(JBM)
6-20	43	ORDER (JBM)—defts allowed to 7/30/85 to respond to motion for further relief. Clerk to calendar motion for hearing on August 5, 1985. CC: counsel & TL
7-16-85		Placed on *AUGUST 1985 MOTIONS CALENDAR*
07-19	44	MOTION FOR RELIEF FROM JUDGMENT, by Defendants—
07-19	45	MOTION FOR THREE JUDGE COURT PURSUANT to 28 USC 2281, et seq.
7-26	46	ORDER (JBM)—The court will limit the hearing scheduled for 8/5/85, to consideration of the motion for a 3-judge court. CC: counsel
7-26	47	PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR THREE-JUDGE COURT—handed to JBM

DATE	NR	PROCEEDINGS
7-30	48	DEFENDANTS' MOTION pursuant to Rule 19 FRCP, or in the Alternative Rule 14, FRCP
7-30	49	DEFENDANTS' BRIEF IN SUPPORT of Motions pursuant to Rules 19 and 14 FRCP
7-30	50	DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES regarding Plaintiffs' Motion for Further Relief and Defendants' Motion for Relief from Judgment
8-09	51	ORDER (JBM)—defendants' motion for a three-judge court pursuant to 28 USC 2281 is DENIED. CC: counsel CO VOL XXX, #393
8-13	52	STIPULATION by parties
8-15	53	ORDER (JBM)—1. Defts' motion for leave to file a third-party complaint against Heckler is GRANTED. 2. Defts immediately serve upon the Sec. copies of all documents. 3. Within 20 days, parties file brief legal memoranda on the legal issues. 4. Clerk set this case for a hearing on all outstanding motions. CC: counsel Filed Copy of 3rd P. Complaint provided N.S. Atty.
8-16	54	MOTION REQUESTING CERTIFICATION FOR INTERLOCUTORY APPEAL, by defts.
8-21	55	ORDER (JBM)—IT IS THEREFORE ORDERED that the motion for certification for interlocutory appeal is DENIED. CC:Attys
8-30		Placed on *SEPT. 16, 1985 MOTIONS CALENDAR.*

DATE	NR	PROCEEDINGS
9-05	56	DEFENDANTS' CERTIFICATE OF SERVICE regarding nos. 45, 47, 51, 55, et al.,
9-05	57	PLAINTIFFS' MEMORANDUM OF LAW–
9-06	58	DEFENDANTS' BRIEF REGARDING STATUTORY CHANGES AFFECTING COURT JUDGMENT
9-09	59	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS IN PART PLAINTIFFS' CLAIM FOR RETROACTIVE AFDC PAYMENTS
9-9	60	DEFENDANTS' IN PART MOTION TO DISMISS PLAINTIFFS' CLAIM FOR RETROACTIVE AFDC PAYMENTS–(Hdg. JBM)
9-13	61	MOTION TO CONTINUE HEARING ON ALL PENDING MOTIONS SCHEDULED FOR SEPTEMBER 18, 1985 by deft.–handed to JBM
9-16	62	AFFIDAVITS and DISCOVERY to be used in hearing on 9/18/85, by pltfs.
9-17	63	DECLARATION OF CAROL B. STACK
9-17	64	AFFIDAVIT OF PATRICIA HUNT
9-17	65	AFFIDAVIT of James Richardson
9-17	66	AFFIDAVIT of Dianne Thomas
9-18	67	MEMORANDUM OF ADDITIONAL AUTHORITY REGARDING STATUTORY CHANGES AFFECTING COURT
9-18		Motion hearing JUDGMENT, by deft.

DATE	NR	PROCEEDINGS
10-01	68	FEDERAL DEFENDANT'S MOTION TO DISMISS and in the Alternative for Summary Judgment
10-09	68a	MOTION FOR EXTENSION of Time, by D-3rd-party pltfs, – proposed order to JBM
10-15	69	DEFENDANTS-THIRD PARTY PLAINTIFFS' RESPONSE to Federal Defendant's Motion to Dismiss and in the Alternative for S. J.
10-18	70	ORDER (JBM) – D-3rd-party pltfs granted until and including 10/21/85 to respond to 3rd-party defts Motion to Dismiss and in the Alternative for S. J. CC: counsel
10-23	71	MOTION TO DISMISS THE PLAINTIFFS' CONSTITUTIONAL CLAIMS, by defts.
10-31	72	PLAINTIFFS' REPLY TO STATE DEFENDANTS' MOTION TO DISMISS
11-08	73	PLAINTIFFS' REPLY TO FEDERAL AND STATE MEMORANDA
11-12	74	RESPONSE to Movants' Submission of Additional Authority
11-12	75	NOTICE OF ADDITIONAL AUTHORITY, by 3rd-Party Deft.
12-23	76	NOTICE OF ADDITIONAL AUTHORITY, by 3rd-party deft.
1986		
1-03	77	MOTION FOR LEAVE TO WITHDRAW AS COUNSEL, by Steven M. Shaber Handed to JBM
3/28	78	Notice of Additional Decisions (by Federal Defendants)

DATE	NR	PROCEEDINGS
5-07	79	MEMORANDUM OF DECISION (JBM)—Plaintiffs are entitled to relie as above indicated, and to costs and attorney fees. They will tender appropriate orders and serve them on all other counsel State defendants are entitled to appropriate relief in their cross-action against federal defendants. They will tender appropriate orders and serve them on all other counsel. CC:Attys—CO VOL XXXI #181
5-13	80	ORDER (JBM)—Typographical errors on pages 55, 60, 61, and 62 of the Memorandum of Decision filed May 6, 1986 have been corrected. The Clerk of court is directed to insert the corrected pages in the memorandum of decision in the court file. IT IS SO ORDERED. CC:Attys, CO COL XXXI 191
5-15	81	ORDER (JBM)—Attorney STEVEN SHABER's motion to withdraw as counsel is GRANT
5-16	81a	MOTION TO STAY MEMORANDUM OF DECISION PEND. APPEAL, w/Memo of Law, AFFID. and
5-21	82	NOTICE by Pltf's Counsel NOT. OF APPEAL attach. (Check was not incld.)
5-21	83	PLAINTIFFS' RESPONSE TO STATE DEFENDANTS' MOTION TO STAY
5-27	84	FEDERAL THIRD-PARTY DEFENDANT'S MOTION FOR CLARIFICATION OF MEMORANDUM OF DECISION—

DATE	NR	PROCEEDINGS
6-05	85	DEFENDANTS WITHDRAWAL OF MOTION FOR STAY AND NOTICE OF APPEAL UNTIL ENTRY OF AN ORDER BY THE COURT – (Hdg.JBM) –
6-18	86	PLAINTIFFS' RESPONSE TO FEDERAL THIRD-PARTY DEFENDANT'S MOTION FOR CLARIFICATION
6-25	87	DEFENDANTS/THIRD PARTY Plaintiffs Proposed Order – handed to JBM
6-25	88	STATE DEFENDANTS RESPONSE to Federal Third-Party Defendant's Motion for Clarification
6-25	89	Plaintiff's PROPOSED ORDER – handed to JBM
7-03	90	ORDER (JBM) – 3rd-party deft's motion for clarification of court's memorandum of decision is GRANTED. CC: counsel
7-03	91	FINAL ORDER (JBM) – 3rd-party defts are required to participate financially by paying the federal share of any payments required of state defts. as a result of this decision. Pltfs' motion for further relief is GRANTED and the pltfs. are entitled to costs and attorneys fees. The state defts!. motion for relief from judgment is DENIED. CC: counsel (EOD 7) CO VOL. XXXI, #255
7-07	92	FEDERAL THIRD-PARTY DEFENDANT'S Motion for Reconsideration of Memorandum of Decision

DATE	NR	PROCEEDINGS
7-09	93	NOTICE OF DEPOSITION, by pltfs. of Kay Fields on 7/17/86
7-14	94	MOTION TO STAY PENDING RECONSIDERATION, by Ds-3rd-party pltfs.
7-14	95	STATE DEFENDANTS/THIRD PARTY PLAINTIFFS'/MOTION FOR RECONSIDERATION OF MEMORANDUM OF DECISION – Handed to JBM
7-14	96	MOTION TO STAY PENDING APPEAL, by Ds-3rd-party pltfs. – Handed to
7-14	97	JUDGMENT IN A CIVIL CASE (CLERK) – Judgment is hereby entered in accordance with the Final Order of this court filed the 3rd day of July, 1986. CC: counsel of Record (EOD 7-14-86) CO VOL XXXI, #267
7-15	98	FEDERAL THIRD-PARTY DEFENDANT'S AMENDED MOTION FOR RECONSIDERATION OF MEMORANDUM OF DECISION AND FINAL ORDER – handed to JBM
7-17	99	MEMORANDUM OF LAW IN SUPPORT OF STAY PENDING APPEAL by the Defendants/Third-Party Plaintiffs
7-17	100	AFFIDAVIT of Kay C. Fields
7-17	101	DEFENDANTS/THIRD PARTY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION

DATE	NR	PROCEEDINGS
7-24	102	MEMORANDUM TO COUNSEL (JBM)—In response to current corresponder the court will not take action on any pending motions until a hearing can be conducted shortly after Aug. 8, 1986. The Clerk is requested to scheduled a hearing on Aug. 21, 1986, to determine all matters at issue. CC:Attys
7-25	103	PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS FOR RECONSIDERATION—
7-29	104	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—
7-31	105	ORDER (JBM)—hearing scheduled for 8/21/86 is POSTPONED. The clerk is requested to set the hearing for Tuesday, August 26, 1986. CC: counsel & TL
8-01	106	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, by Defendants-Third Party Plaintiffs, w/CS
8-12		Noticed for hrg. on pending mots. at 10:00 a.m. on 8-26-86 before JBM in Charles
8-21	107	NOTICE OF APPEAL to the FCCA by third-party deft. Otis R. Bowen, from final order of 7/3/86 and final judgment of 7/14/86. CC: counsel and FCCA with transmittal letter

DATE	NR	PROCEEDINGS
8-25	108	ORDER (JBM)—upon consideration of the Motion of the State Defendants for a Stay Pending Appeal and with the consent of the Pltfs., the Court now STAYS its Final Order of July 3, 1986, except as specified herein. CC: counsel
8-25	109	ORDER (JBM)—The motions of the state defendants and federal third party defendants for reconsideration are therefore DENIED. CC: counsel
9-02	110	NOTICE OF APPEAL to the Fourth Circuit Court of Appeals by Defts-Third-Party Plaintiffs—copy to FCCA with transmittal letter and docket sheet—Fil Fee paid R#16046
9-02	111	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, by the Defts-Third-Party-Plaintiffs
9-16	112	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, by The Third-Party Defendant, Otis R. Bowen, from the final order entered on 7/3/86, the final judgment entered on 7/14/86 and the ordered entered on 8/25/86, denying the motions for reconsideration.
10-14	113	PETITION FOR WRIT OF CERTIORARI by the Supreme Court of the U.S. allowed and docketed as No. 86-509.

DATE	NR	PROCEEDINGS
10-15	114	NOTICE OF APPEAL by 3rd-party deft. from final order entered on 8/25/86, denying the motions for reconsideration. CC: counsel and FCCA
10-20	115	PETITION FOR WRIT OF CERTIORARI BY THE SUPREME COURT OF THE U. S. ALLOWED AND DOCKETED as No. 86-564
10-23	116	ORDER (FCCA)—motions to hold these appeals in abeyance pending action by the U. S. Supreme Court on the appeals taken to that Court by the state and federal appellants is granted.
12-08	117	DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO PROPOSED ORDER AMENDING CLASS
12-11	118	LISTS OF CLASS MEMBERS REQUIRED TO BE FILED WITH COURT—Three Volumes—118a, 118b & 118c—Separate Folders

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Docket No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD, LORETTA GILLIARD; THOMAS GILLIARD, DANA GILLIARD, GREGORY GILLIARD, REGINALD GILLIARD, AND SAMUEL DAVIS, JR. GILLIARD, MINORS BY THEIR MOTHER AND NEXT FRIEND, BEATY MAE GILLIARD; ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS.

v.

CLIFTON M. CRAIG, INDIVIDUALLY AND AS NORTH CAROLINA COMMISSIONER OF SOCIAL SERVICES; NORTH CAROLINA BOARD OF SOCIAL SERVICES, A PUBLIC BODY CORPORATE; JOHN R. JORDAN, JR., MRS. THOMAS E. MEDLIN, MRS. NEIL J. GOODNIGHT, DR. BRUCE B. BLACKMON, SARAH AUSTIN, TROY H. THOMPSON AND ROBERT L. LYDAY, INDIVIDUALLY AND AS MEMBERS OF THE NORTH CAROLINA BOARD OF SOCIAL SERVICES; WALLACE H. KURALT, INDIVIDUALLY AND AS MECKLENBURG COUNTY DIRECTOR OF SOCIAL SERVICES; AND MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS

COMPLAINT

[Filed MAY 5, 1970]

JURISDICTION

1. This action arises under Title 42 U.S.C. Section 1983 and is brought to redress the deprivation by Defendants of rights, privileges and immunities secured to Plain-

tiffs by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and by the Social Security Act of 1935, as amended, Title 42 U.S.C. Section 601 et seq., as hereinafter more fully appears. Jurisdiction is conferred on this Court by Title 28 U.S.C. Sections 1343(3) and 1343(4).

2. This is an action for a declaratory judgment brought pursuant to Title 28 U.S.C. Sections 2201 and 2202, for the purpose of determining a question of actual controversy between the parties and declaring illegal and unconstitutional the policies, practices, procedures and regulations complained of herein.

3. This is an action for declaratory and injunctive relief against the enforcement of statewide policies, practices, procedures and regulations, brought pursuant to Title 28 U.S.C. Sections 2281 and 2284 requiring the convening of a three-judge Court.

CLASS ACTION

4. Plaintiffs bring this action on behalf of themselves and all other North Carolina recipients of public assistance pursuant to Title 42 U.S.C. Section 601 et seq. (hereinafter "AFDC recipients") and all other fathers of AFDC recipients who are making support payments for such AFDC recipients (hereinafter "supporting fathers") similarly situated, as hereinafter more fully appears. The said class of AFDC recipients and supporting fathers includes approximately 126,000 members and it is therefore impracticable to bring them all before the Court; there are questions of law and fact presented herein which are common to the entire class of AFDC recipients and supporting fathers and such common questions predominate over any other questions which may arise in this action; the claims of the Plaintiffs are typical of the claims of said class; and the Plaintiffs will fairly and adequately protect the interests of said class.

PARTIES

5. Plaintiff Beaty Mae Gilliard is a citizen of the United States residing in Mecklenburg County, North Carolina; she is the mother of minor Plaintiffs Lorraine Gilliard, age 15, Loretta Gilliard, age 15, Thomas Gilliard, age 12, Dana Gilliard, age 11, Gregory Gilliard, age 9, Reginald Gilliard, age 8, and Samuel Davis, Jr. Gilliard, age 5 months; all minor Plaintiffs currently reside with their mother in Mecklenburg County, North Carolina. Plaintiff Samuel Odell Davis is a citizen of the United States residing in Mecklenburg County, North Carolina; he is the father of minor Plaintiff Samuel Davis, Jr. Gilliard, as hereinafter more fully appears.

6. Defendant Clifton M. Craig is Commissioner of Social Services for North Carolina (hereinafter "State Commissioner") and, in said capacity, has primary responsibility for the administration of public assistance, including the AFDC program, throughout North Carolina. Defendant North Carolina Board of Social Services (hereinafter "State Board") is a corporate governmental agency organized under the Constitution and Laws of North Carolina and authorized thereunder to adopt policies and authorize actions governing the administration of public assistance, including the AFDC program throughout North Carolina. Defendants John R. Jordan, Jr., Mrs. Thomas E. Medlin, Mrs. Neil J. Goodnight, Bruce B. Blackmon, Sarah Austin, Troy H. Thompson, and Robert L. Lyday are the individual members of Defendant State Board and, in the aggregate, compose the total membership of Defendant State Board. Defendant Wallace H. Kuralt is Director of Defendant County Department (hereinafter "County Director") and, in said capacity, has primary responsibility for the administration of public assistance, including the AFDC program throughout Mecklenburg County, North Carolina. Defendant Mecklenburg County Department of Social

Services (hereinafter "County Department") is a corporate governmental agency organized under the Constitution and Laws of North Carolina and authorized thereunder to administer public assistance, including the AFDC program, throughout Mecklenburg County, North Carolina.

STATEMENT OF CLAIM

7. Plaintiff Beaty Mae Gilliard and minor Plaintiffs, her seven children, are currently receiving North Carolina public assistance pursuant to the AFDC program and, on information and belief, Plaintiff Beaty Mae Gilliard has been receiving North Carolina public assistance pursuant to the AFDC program for herself and her children since 1962.

8. At the birth of minor Plaintiff Samuel Davis, Jr. Gilliard in November, 1969, he was automatically included in Plaintiff Beaty Mae Gilliard's AFDC grant, and said child has continued to be included in said AFDC grant from his birth to date, without any application for such inclusion having been made or any consent given by Plaintiff Beaty Mae Gilliard.

9. The automatic and continuing inclusion of minor Plaintiff Samuel Davis, Jr. Gilliard in Plaintiff Beaty Mae Gilliard's AFDC grant, which inclusion has been authorized without any application having been made or without any consent having been given, as set forth in Paragraph 8, has been effected pursuant to policies, practices, procedures and regulations adopted and administered by Defendants.

10. The incremental increase in the total monthly budgetary requirements of Plaintiff Beaty Mae Gilliard and her family, based upon the inclusion of minor Plaintiff Samuel Davis, Jr. Gilliard in the AFDC grant, is

$11.50, as determined pursuant to policies, practices, procedures and regulations adopted and administered by Defendants.

11. Plaintiff Samuel Odell Davis has been pronounced and declared the father of minor Plaintiff Samuel Davis, Jr. Gilliard in an Order signed April 6, 1970 by the duly-authorized Assistant Clerk of the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina pursuant to North Carolina General Statutes Section 49-10.

12. From the birth of minor Plaintiff Samuel Davis, Jr. Gilliard in November, 1969, Plaintiff Samuel Odell Davis has paid regularly an average $43.33 every month for the sole purpose of supporting his son, minor Plaintiff Samuel Davis, Jr. Gilliard.

13. On February 4, 1970 Defendant County Department, pursuant to policies, practices, procedures and regulations adopted and administered by Defendants, found that the total monthly budgetary requirements of Plaintiff Beauty Mae Gilliard and minor Plaintiffs, her seven children, for March, 1970 would be $227.00.

14. On information and belief, were minor Plaintiff Samuel Davis, Jr. Gilliard not included in Plaintiff Beaty Mae Gilliard's AFDC grant, Defendant County Department, pursuant to policies, practices, procedures and regulations adopted and administered by Defendants, would find that the total monthly budgetary requirements for Plaintiff Beaty Mae Gilliard and her six oldest children, minor Plaintiffs were approximately $217.00 and the monthly AFDC payment to said Plaintiffs would be approximately $217.00.

15. On or about March 4, 1970 Plaintiff Beaty Mae Gilliard received a total AFDC payment for March, 1970 of $184.00; on or about April 3, 1970 Plaintiff Beaty Mae Gilliard received a total AFDC payment for April, 1970 of $184.00.

16. On information and belief, Defendant County Department purposefully deducted $43.33 from the total monthly budgetary requirements to calculate the AFDC payments for March and April, 1970 and, on information and belief, such deductions were a direct consequence of a determination by Defendant County Department that the $43.33 average monthly payment by Plaintiff Samuel Odell Davis, as set forth in Paragraph 12, was a resource available to Plaintiff Beaty Mae Gilliard and all seven of her children, minor Plaintiffs, such determination having been made pursuant to policies, practices, procedures and regulations adopted and administered by Defendants.

17. On information and belief, if Plaintiff Samuel Odell Davis continues to make regular support payments for his son, minor Plaintiff Samuel Davis, Jr. Gilliard, Defendant County Department will continue to deduct such payments in calculating monthly AFDC payments to Plaintiff Beaty Mae Gilliard and minor Plaintiffs, her seven children, as described in Paragraph 16, pursuant to policies, practices, procedures and regulations adopted and administered by Defendants.

CAUSES OF ACTION

As a result of the actions taken by Defendants, as set forth in Paragraphs 7-17, Plaintiffs have been and will continue to be deprived of rights, privileges and immunities secured to them by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and by the Social Security Act of 1935, as amended, Title 42 U.S.C. Section 601 et seq.

18. The Social Security Act of 1935, as amended, Title 42 U.S.C. Section 601 et seq., establishes the federal-state AFDC income maintenance program designed to facilitate the care of needy dependent children in their own homes or in the homes of relatives in order to strengthen family bonds and to encourage the development of self-

sufficiency and personal independence. North Carolina participates in the AFDC program, which program provides, *inter alia*, that AFDC benefits are payable only to specified needy dependent children and to specified relatives with whom they are living and that, in determining need, resources available to AFDC applicants must be taken into consideration.

19. Defendants have adopted and administered policies, practices, procedures and regulations governing the administration of the AFDC program throughout North Carolina and throughout Mecklenburg County, North Carolina. All such policies, practices, procedures and regulations whose adoption and administration have contributed to the injuries complained of herein shall be questioned in this action; specifically at issue, however, is Section 2321 (I)(B)(8), North Carolina Department of Social Security Manual, Social Services Division, Financial Services, Supplement No. 238 to County Letter No. 55, Rev. 7-1-69, which regulation sets forth the requirement that support payments be deduced as a resource in calculating the monthly AFDC payments.

20. Defendants' automatic inclusion of minor Plaintiff Samuel Davis, Jr. Gilliard in Plaintiff Beaty Mae Gilliard's AFDC grant, as set forth in Paragraph 8, contravenes the federal statutory provision described in Paragraph 18 by authorizing payment of AFDC benefits to a dependent child who is not needy; said automatic inclusion operates to deprive Plaintiff Beaty Mae Gillard, minor Plaintiffs, her children, and Plaintiff Samuel Odel Davis of rights secured by the Due Process and Equal Protection Clausess of the United States Constitution, as hereinafter more fully appears.

21. Defendants' deduction of the support payments made by Plaintiff Samuel Odell Davis for his son, minor Plaintiff Samuel Davis, Jr. Gilliard, in calculating monthly AFDC payments, contravenes the federal statutory pro-

vision described in Paragraph 18 by characterizing such support payments as resources available to Plaintiff Beaty Mae Gilliard and all seven of her children, minor Plaintiffs, when such support payments are made solely for the benefit of minor Plaintiff Samuel Davis, Jr. Gilliard, who is entitled under the Laws of North Carolina to the full benefit of such support payments; said deduction operates to deprive Plaintiff Beaty Mae Gilliard, minor Plaintiffs, her children, and Plaintiff Samuel Odell Davis of rights secured by the Due Process and Equal Protection Clauses of the United States Constitution, as hereinafter more fully appears.

22. Defendants' actions, as set forth in Paragraph 7-17, have operated and will continue to operate in contravention of federal law to deprive Plaintiff Beaty Mae Gilliard and her six oldest children, minor Plaintiffs, of AFDC benefits to which they are entitled, as set forth in Paragraphs 14 and 15, and have consequently operated to significantly impede their development of self-support and personal independence, substantial personal liberties to which said Plaintiffs are entitled under the Constitution and Laws of the United States. Defendants' actions have operated and will continue to operate to deprive said Plaintiffs of these personal liberties in violation of the due Process Clause in that Defendants' actions are patently arbitrary and totally devoid of procedures necessary to protect the interests of said Plaintiffs. Moreover, Defendants' actions have operated and will continue to operate so as to deprive said Plaintiffs of these personal liberties in violation of the Equal Protection Clause in that Defendants' actions arbitrarily and irrationally discriminates between AFDC recipients in grants with an included child received independent support payments for said child's sole benefit from a parent and AFDC recipients in grants with no included child receiving independent support payments from a parent: the former receive monthly AFDC payments cal-

culated by deducting the support payments from the total monthly requirements of the entire family; the latter suffer no such arbitrary deduction.

23. Defendants' action, as set forth in Paragraphs 7-17 and which contravene federal law, as set forth in Paragraphs 19 and 20, have operated and will continue to operate to deprive minor Plaintiff Samuel Davis, Jr. Gilliard of the full benefit of the support payments made for him by his father, Plaintiff Samuel Odell Davis, in that Defendants' actions have, by arbitrarily reducing the monthly AFDC payments to Plaintiff Beaty Mae Gilliard, caused her to divert support payments to meet the requirements of herself and of her six oldest children, minor Plaintiffs, thereby, in violation of the Due Process Clause, arbitrarily depriving minor Plaintiff Samuel Davis, Jr. Gilliard of support payments to which he is legally entitled and of critical personal liberties relative to his development into a mature and productive member of society which personal liberties are dependent upon receipt by him of the full support payments.

Moreover, Defendants' actions, as set forth in Paragraphs 7-17 and as authorized by the North Carolina General Assembly, have operated and will continue to operate to deprive said minor Plaintiff of support payments and the concomitant substantial personal liberties in violation of the Equal Protection Clause in that the North Carolina General Assembly acting through defendants, its duly-authorized agents, has effected an arbitrary and irrational discrimination between children receiving support payments who are included in AFDC grants and children receiving support payments who are not included in AFDC grants: Defendants assume, pursuant to state law, that the former will not receive the full support payments and the consequence of this assumption is a reduction in AFDC payments to the family which causes

the diversion of support payments from the child entitled to them to others included in the AFDC grant; the latter are, pursuant to state law, entitled to the full benefit of support payments, as are the former, but unlike the former, the latter suffer from no arbitrary assumption encouraging diversion of such support payments.

24. Defendants' actions, as set forth in Paragraphs 7-17 and in contravention of federal law as set forth in Paragraphs 19 and 20, have operated and will continue to operate to deprive Plaintiff Samuel Odell Davis of the full benefit of the support payments made by him for his son, minor Plaintiff Samuel Davis, Jr. Gilliard in violation of the Due Process Clause and have operated to create and will continue to operate to enforce a binding obligation upon Plaintiff Samuel Odell Davis to make support payments for children of whom he is not the father in violation of the Due Process Clause. Defendants' actions have, by arbitrarily reducing the monthly AFDC payments to Plaintiff Beaty Mae Gilliard, caused her to divert support payments to meet the requirements of herself and her six oldest children, minor Plaintiffs, thereby depriving Plaintiff Samuel Odell Davis of the substantial intangible benefits and satisfactions naturally derived from supporting the development of one's son into a mature man, in violation of the Due Process Clause, Moreover, Defendants' actions have, by arbitrarily reducing the monthly AFDC payments to Plaintiff Beaty Mae Gilliard, caused her to divert support payments to meet the requirements of herself and her six oldest children, minor Plaintiffs, thereby casing allocation, in violation of the Due Process Clause, of support payments which Plaintiff is, pursuant to state law, legally obligated to make, to children who Plaintiff owes no legal obligation to support. Furthermore, Defendants' actions have operated and will continue to operate to deprive Plaintiff Samuel Odell Davis of

substantial intangible benefits and to create and enforce an unjustifiable, unauthorized obligation in violation of the Equal Protection Clause, in that the North Carolina General Assembly acting through Defendants, its duly authorized agents, has effected an arbitrary and irrational discrimination between fathers supporting children included in an AFDC grant and fathers supporting children not included in an AFDC grant: the former, because of the arbitrary reduction of monthly AFDC payments, have their support payments diverted from their children for the benefit of others; the latter suffer no such diversion of their support payments.

25. The claims set forth in Paragraphs 18-24 are implicity alternative, the apparent inconsistencies arising from the lack of accurate information concerning the present and future disposition of the $43.33 average monthly support payment by Plaintiff Samuel Odell Davis for minor Plaintiff Samuel Davis, Jr. Gilliard.

26. There is an actual controversy now existing between the parties to this action as to which Plaintiff seek the judgment of this Court. Plaintiffs seek a declaration of the legal rights and relationships involved in the subject matter and existing controversy.

27. Plaintiffs, and the class which they represent, will suffer irreparable injury through economic deprivation caused by the administration of the policies, practices, procedures and regulations of Defendants.

28. Plaintiffs, and the class which they represent, have no plain, adequate or speedy remedy at law to redress such injury and will continue to suffer injury unless and until Defendants' policies, practices, procedures and regulations complainted of herein are enjoined; therefore, Plaintiffs bring this action for declaratory and injunctive relief as their only means of securing adequate relief.

WHEREFORE, Plaintiffs, on behalf of themselves and the class which they represent, pray the Court that this case be advanced on the docket and that:

1. A three-judge Court be convened pursuant to Title 28 U.S.C. Sections 2281 and 2284 to hear and determine the issue herein;

2. Pending the convening of said three-judge Court, Defendants be temporarily restrained from deducting support payments made by fathers to AFDC recipients from the total monthly budgetary requirements of AFDC families in calculating monthly AFDC payments to such families;

3. Subsequent to the convening of said three-judge Court, Section 2321(I)(B)(8) of the North Carolina Department of Social Services Manual, Social Services Division, Financial Services, Supplement No. 238 to County Letter No. 55, Rev. 7-1-69, be declared illegal and unconstitutional insofar as said regulation authorizes deduction of support payments made to AFDC recipients in calculating monthly AFDC payments to the entire AFDC family and administration and enforcement of said regulation be preliminarily and permanently enjoined;

4. Subsequent to the convening of said three-judge Court, said Court declare illegal and unconstitutional and preliminarily and permanently enjoin Defendants' actions: (a) including children in AFDC grants automatically, without either application having been made or consent having been given by the head of the AFDC household; (b) including children in AFDC grants who are receiving adequate independent support; and (c) characterizing independent support payments to individual AFDC recipients as resources properly deductible in calculating monthly AFDC payments.

5. Plaintiffs be allowed their costs in this action and that Plaintiffs and the class which they represent be

granted such further relief as the Court deems just and proper.

Respectfully submitted this ____ day of April, 1970.

_____

Gail F. Barber

/s/ THOMAS W. PULLIAM, JR.

Thomas W. Pulliam, Jr.
Attorneys for the Plaintiffs
Legal Aid Society of
Mecklenburg County
1101 Statesville Avenue
Charlotte, North Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA CHARLOTTE DIVISION

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD, LORETTA GILLIARD; THOMAS GILLIARD, DANA GILLIARD, GREGORY GILLIARD, REGINALD GILLIARD, AND SAMUEL DAVIS, JR. GILLIARD, MINORS BY THEIR MOTHER AND NEXT FRIEND, BEATY MAE GILLIARD; ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED.
PLAINTIFFS,

v.

CLIFTON M. CRAIG, INDIVIDUALLY AND AS NORTH CAROLINA COMMISSIONER OF SOCIAL SERVICES: NORTH CAROLINA BOARD OF SOCIAL SERVICES, A PUBLIC BODY CORPORATE; JOHN R. JORDAN, JR., MRS. THOMAS E. MEDLIN, MRS. NEIL J. GOODNIGHT, DR. BRUCE B. BLACKMON, SARAH AUSTIN, TROY H. THOMPSON AND ROBERT L. LYDAY, INDIVIDUALLY AND AS MEMBERS OF THE NORTH CAROLINA BOARD OF SOCIAL SERVICES; WALLACE H. KURALT, INDIVIDUALLY AND AS MECKLENBURG COUNTY DIRECTOR OF SOCIAL SERVICES; AND MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS.

MOTION FOR FURTHER RELIEF

Now come members of the Plaintiff class in this cause and move the Court for further relief and enforcement of the Order entered herein on December 10, 1971.

As grounds therefor, members of the Plaintiff class allege:

1. The movants herein are Dianne Thomas, and her two children Sherrod and Crystal; Mary Medlin and her four children Anthony,

Roderick, Karen and Jermaine; Joyce Miles and her five children DeAngela, Felicia, Larry, Johnetta and Kisha; and Arvis Waters and her five children Allen, Andre, Alice, Bernard and Aaron. Each is a member of the class as defined in the Judgment entered in this action on December 10, 1971, this is, each is a person who has been subjected to reduction, termination or denial of AFDC benefits based upon the unconstitutional or illegal claim of credit by the administering agencies for outside income and other resources available to some, but not all, of the family group. Affidavits of Thomas, Medlin, Miles and Waters persons are attached and incorporated herein by reference.

2. Since the fiing of this action, the North Carolina Department of Human Resources has assumed the functions previously carried out by the North Carolina Board of Social Services. *See* N.C.G.S. § 143B-138. The Social Services Commission of the Department of Human Resources now has the particular power and duty to adopt rules and regulations to be followed in the conduct of the State's social services programs. Phillip J. Kirk is the Secretary of the Department of Human Resources and Dr. C. Barry McCarty is the Chairman of the Social Services Commission. As such, they are the successors-in-interest to the defendants in this action.

3. By virtue of the Judgment entered in this action, the defendants are permanently enjoined from "directly or indirectly reducing, or continuing to reduce, withholding, or continuing to withhold, the payment to AFDC beneficiaries of any funds on the basis of crediting outside income or resources of one or more members of the family

group without first determining that such income is legally available to all members of the family group. The December 10, 1971 Judgment is attached.

4. On October 1, 1984, the defendants resumed conduct which is prohibited by the Judgment, in that they promulgated and implemented regulations known as the "Standard Filing Unit" regulations found primarily at Section 2360 of the AFDC Manual. These regulations require that all the siblings and half-siblings of a dependent child be included in an AFDC application for that dependent child. The result of this inclusion is that all the income of those siblings is considered as available to the whole unit without a determination that such income is legally available to all members of the family group.

5. The instructional materials issued by defendants indicate that the Standard Filing Unit regulations were promulgated as a result of the Deficit Reduction Act of 1984, Public Law 98-369. *See* Change Notice for Manual No. 8-85, attached. Properly interpreted, however, the Deficit Reduction Act does not authorize the defendants to consider the legally restricted income of one child as available to the whole unit, and does not authorize defendants to violate the Judgment herein.

6. Furthermore, the defendants' new regulations violate the Fifth and Fourteenth Amendments of the United States Constitution, in the same manner as was alleged in the Complaint. In addition, the Standard Filing Unit regulations give rise to violations of the "Takings Clause" of the Fifth Amendment, and the Tenth Amendment.

WHEREFORE, movants Thomas, Medlin, Miles and Waters pray the Court to:

1. Enter a further Order in this action invalidating the Standard Filing Unit regulations and reaffirming the original injunction;

2. Order defendants to make full restitution to all class members of AFDC benefits lost as a result of the implementation of the Standard Filing Unit regulations;

3. Award attorneys' fee to Plaintiff's Counsel;

4. Enter such other relief as to the Court seems proper.

This the 30th day of May, 1985.

EAST CENTRAL COMMUNITY
LEGAL SERVICES
Attorneys for Plaintiff Class
Members

By: /s/ JANE R. WETTACH

Jane R. Wettach
5 West Hargett Street,
Suite 600
Post Office Drawer 1731
Raleigh, North Carolina
27602
(919) 828-4647

CIVIL LEGAL ASSISTANCE
CLINIC
Attorneys for Plaintiff Class
Members

By: /s/ LUCIE E. WHITE
Lucie E. White

/s/ JEAN M. CARY
Jean M. Cary
University of North Carolina
School of Law
Van Hecke – Wettach Hall
064A
Chapel Hill, NC 27514
919-962-4107

Of Counsel:
Lauren Stevens, Third-Year Law Student
Ramona Cunningham, Third-Year Law Student

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD, LORETTA GILLIARD; THOMAS GILIARD, DANA GILLIARD, GREGORY GILLIARD, REGINALD GILLIARD, AND SAMUEL DAVIS, JR. GILLIARD, MINORS BY THEIR MOTHER AND NEXT FRIEND, BEATY MAE GILLIARD; ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED. PLAINTIFFS,

v.

CLIFTON M. CRAIG, INDIVIDUALLY AND AS NORTH CAROLINA COMMISSIONER OF SOCIAL SERVICES, NORTH CAROLINA BOARD OF SOCIAL SERVICES, A PUBLIC BODY CORPORATE; JOHN R. JORDAN, JR., MRS. THOMAS E. MEDLIN, MRS. NEIL J. GOODNIGHT, DR. BRUCE B. BLACKMON, SARAH AUSTIN, TROY H. THOMPSON AND ROBERT L. LYDAY, INDIVIDUALLY AND AS MEMBERS OF THE NORTH CAROLINA BOARD OF SOCIAL SERVICES; WALLACE H. KURALT, INDIVIDUALLY AND AS MECKLENBURG COUNTY DIRECTOR OF SOCIAL SERVICES; AND MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS.

JUDGMENT

This cause having come on for hearing on the 5th day of November 1970, and the 21st day of May, 1971, and the Court having found that Aid to Families with Dependent Children (AFDC) benefits have been wrongfully withheld by the Defendants from the Plaintiffs and the members of

the class which they represent, it is Ordered, Adjudged and Decreed as follows:

INDIVIDUAL RELIEF

1. That the Defendants, their officers, agents, servants and employees, and those persons acting under, or in concert with them, be and they hereby are permanently restrained and enjoined from directly or indirectly:

   A. Including, or continuing to include, as family resources, support payments belonging individually to Samuel Davis, Jr.

   B. Withholding, or continuing to withhold, reducing, or continuing to reduce, the payment of AFDC benefits from the members of the Gilliard family, because of the presumed availability to the family group of support payments available only to Samuel Davis, Jr.

2. That the Defendant, its officers, agents and employees restore to Plaintiff Beaty Mae Gilliard payments of $217.00 per month retroactive to March, 1970, at the rate of $43.00 per month.

CLASS RELIEF

2. *Definition of the class.* For purposes of relief, the class is defined as all those persons who have been or may be subject to reduction, termination or denial of AFDC benefits based upon the unconstitutional or illegal claim of credit by administering agencies for outside income and other resources available to some, but not all, of the family group.

3. *Prospective Relief.* It is further Ordered, Adjudged, and Decreed that the Defendants, their officers, agents, servants, employees, and those persons acting under or in concert or participation with them,

be, and they hereby are restrained and enjoined from directly or indirectly reducing, or continuing to reduce, withholding, or continuing to withhold, the payment to AFDC beneficiaries of any funds on the basis of crediting outside income or resources of one or more members of the family group without first determining that such income is legally available to all members of the family group.

4. *Retroactive Relief.* It is further Ordered, Adjudged, and Decreed that the Defendants shall pay to the members of the class benefits which they would have received but for the unlawful reduction, termination, or denial dating from March, 1970, the date of the final administrative action by the commissioner in the named Plaintiffs' case.

5. *Procedure for Determination of the Class.* It is further Ordered, Adjudged, and Decreed that the North Carolina Department of Social Services shall file with the Court and provide a copy to counsel for the Plaintiffs the following lists:

A. The names and addresses of all those persons deemed by the Defendant to be owed money under the terms of the judgment, indicating the amount of money owed and the reason for payment.

B. The names and addresses of all those persons to whom benefits have been denied, reduced or terminated since March, 1970, because of income deemed available to all members of the family group, but which, under the terms of the judgment was available to some, but not all, of the family group. This list shall specify as to each recipient the kind of action taken, the reason for the action, the effective date of the action, and the amount of money involved.

6. *Procedure for Notification of the Class.* It is further Ordered, Adjudged, and Decreed that the North Carolina Department of Social Services, its officers, employees or agents, shall, on or before Sixty Days (60) from the date of this Judgment, notify all AFDC recipients of this Judgment. The notice shall be in the form of the letter attached to this Judgment, an Exhibit "A" and shall explain the terms of the judgment in simple language. The notice shall include the provision that if the recipient feels that he or she has a right to reimbursement, he or she has a right to appeal for those payments retroactive to March, 1970, within Sixty Days (60) of the date of the notice. The notice shall also include a form returnable to the North Carolina Department of Social Services on which such claimants may indicate their desire to appeal.

7. It is further Ordered, Adjudged, and Decreed that the North Carolina Department of Social Services, its officers, agents, and employees, shall, upon receipt of such appeal, in accordance with this Judgment, and the applicable federal and state regulations, determine the entitlement of each such appellant to the restoration of payments retroactive to March, 1970, or the date of the original determination.

Dated: December 10, 1971.

/s/ JAMES B. MCMILLER

James B. McMiller
United States District Judge
For the Court

EXHIBIT "A"

TO: ***All AFDC Recipients***

In June of this year the Federal District Court in Charlotte decided a case which may give you the right to increased benefits.

The Court decided that the Department of Social Service could not reduce the grant of an AFDC recipient with 7 children who was receiving support from the father of the seventh child who was not the father of any of the other children. The reason the Department of Social Services had reduced the grant was that it was counting the support payments as a general resources available to the whole family, when legally the recipient had to apply it only to the child who was entitled to it.

This decision may affect people who have outside income (such as support payments) which has been credited by the Department of Social Services to reduce, deny, or terminate a welfare check to AFDC beneficiaries.

If you have outside payments made to you which legally are to be used for less than all members of your family and the Department of Social Services has counted the money as being available to all members of the family, then the Department of Social Service will make over your budget so that the outside money will be counted as income only for those members of your family who are legally entitled to receive it.

If you have any questions about this letter or whether you come within this group, contact your caseworker or the nearest Legal Aid office.

If you think you have had your payments reduced, terminated or denied at any time since March, 1970, because the Department of Social Services has counted income which it should not have counted fill in the enclosed appeal form and return it to your local Department of Social

Services. If you have any questions as to whether you come within this group, contact Gail Barber, Legal Aid Society of Mecklenburg County, 1101 Statesville Avenue, Charlotte, North Carolina 28206, (704) 376-6591.

DSS-2198 (8/76)

CHANGE NOTICE FOR MANUAL

DATE September 13, 1984

MANUAL Aid to Families with Dependent Children (AFDC)

CHANGE NO. 8-85

TO: COUNTY DIRECTORS OF SOCIAL SERVICES

EFFECTIVE October 1, 1894 MAKE THE FOLLOWING CHANGE(S) TO AFDC MANUAL.

AFDC-2360 is revised effective October 1, 1984 to incorporate revised regulations resulting from the Deficit Reduction Act of 1984, Public Law 98-369, and from the 10% increase in AFDC benefits approved by the General Assembly. Primarily, the revisions are as follows:

1. Change in the 150% rule. To determine initial eligibility, the assistance unit's gross income will be compared to 185% of the Need Standard.
2. Inclusion of definition of Standard Filing Unit. Except in certain instances, a parent and all minor children who are brothers and sisters and who are living together must be included in the same assistance unit.
3. Modifications to what income is counted in the 185% rule. Up to $50 will be subtracted from child support payments. In certain situations, deemed income from a parent or legal guardian to a minor mother will be counted.
4. Changes in budgeting procedures for when a minor mother lives with a parent.
5. Addition of budgeting procedures for when a minor mother lives with a legal guardian.

6. Inclusion of revised tables to reflect the 10% increase in AFDC benefits and the 185% of Need Standard.

Remove AFDC-2360 and Tables 1-5. Insert the attached section and tables.

If you have questions, please call your Income Maintenance Representative.

/s/ BONNIE M. CRAMER
Bonnie M. Cramer
Assistant Director for
Program Administration

KCF/JBS/1d
Attachment

References: 45 CFR 206.10; 45 CFR 232.20 and 233.20 (a)(4);
45 CFR 233.20 (a)(3)(xiii); 45 CFR 233.20 (a)(3)(xviii);
House Bill No. 80

North Carolina Department of Human Resources
Division of Social Services
Assistance Payments Section
AFDC Manual AFDC-2360

Transmitted by Change No. 8-85

Need Rev. 10-1-84

I. Eligibility Requirement

To determine if the assistance unit is in need, apply the 185% rule to the Need Standard. (See V. below.) If the assistance unit does not meet this initial test of eligibility, deny or terminate assistance. If the assistance unit does meet the 185% rule, calculate the payment by subtracting countable net income from the Payment Standard. If there is a deficit, the assistance unit is in need.

II. Definitions

A. Need Standard – The amount of money the State determines to meet a minimal standard of living for a family of a specified size (Table 1). Always use the Need Standard or the Individual Need Standard to determine:

1. Initial eligibility (185%) rule. (Table 3)
2. Needs of a parent who is excluded from the assistance unit because he does not meet one or more of the eligibility requirements. (Table 2)
3. Needs of a parent(s) and others living in the home when deeming income to a minor mother. See AFDC-2350. (Table 1)
4. Needs of a stepparent and other persons living in the home when deeming income from a stepparent. See AFDC-2350. (Table 1)

5. Needs of an individual sponsor, his/her spouse, and other persons when deeming income to a non-exempt alien. See AFDC-2350. (Table 1)
6. Dependents' need for work release. See AFDC-2350. (Table 1)
7. Eligibility for the $30 and ⅓ disregard for an applicant who has not received in one of the four months prior to the month of application. (Table 1)

B. Payment Standard – The amount (50% of the Need Standard) from which to subtract countable net income to calculate the payment (Table 4)

C. Budget Unit – All those for whom application has been made plus anyone in the home who is liable for the support of a member of the assistance unit or whose income is counted as available to the assistance unit. That is, parent for child, spouse for spouse, stepparent or individual sponsor for the assistance unit.

D. Assistance Unit – The total number of applicants/recipients whose needs are considered in determining the payment amount.

III. Standard Filing Unit

A. The parent and all minor children who are brothers and sisters, including half brothers and sisters, and who are living together must be included in the same assistance unit unless:

1. The parent or child is an SSI recipient, or

2. The parent or child does not meet all eligibility factors with the exception of income and reserve. Do not exclude a parent or child because of the amount of income or reserve he has.

This rule applies when a minor mother receives adoption assistance (IV-E), and her adoptive parent or the minor mother applies for AFDC for a dependent child. The minor mother must be included in the assistance unit unless she meets the exception above.

A parent or child who was determined ineligible due to receipt of a lump sum payment while he was a member of another assitance unit cannot be included in the assistance unit until the period of ineligibility ends.

B. The applicant may choose to apply for a stepchild; however, a stepchild is not required to be in the assistance unit. Explain the advantages and disadvantages of the choice.

IV. Who Is In The Assistance Unit:

A. Parent—Count him in the assistance unit unless he:

1. Receives SSI.
2. Does not meet all eligibility factors with the exception of income and reserve. Do not exclude a parent or child because of the amount of income or reserve he has.

B. Minor Mother

1. Minor mother living with a parent(s) who receives AFDC – Minor mother and her child must be included in the assistance unit with her mother unless:
   a. She receives SSI.
   b. She does not meet all eligiblity factors with the exception of income and reserve. Do not exclude a parent or child because of the amount of income or reserve he has.
2. Minor mother living alone or with a parent(s) who does not receive AFDC, or with a specified relative other than a parent – Include the minor mother as payee in her own assistance unit unless:
   a. She receives SSI.
   b. She does not meet all eligibility factors with the exception of income and reserve. Do not exclude a parent or child because of the amount of income or reserve he has.

C. Stepparent – Do not count him in the assistance unit unless the parent is incapacitated.

D. Specified Relative Other Than Parent – Count him in the assistant unit unless he:

1. Receives SSI.
2. Does not meet the eligiblity requirements.
3. Does not want assistance.

E. Spouse of a Specified Relative Other Than a Parent—Do not count the spouse in the assistance unit unless he:

1. Chooses to apply for or be included in the payment, *and*
2. Meets the requirements for an essential person outlined in AFDC-2100.

F. Child—Include each minor brother and sister, including half brother and half sister, in the assistance unit unless:

1. He receives SSI.
2. He does not meet the eligiblity requirements.

G. Essential Person—Count him in the assistance unit if he:

1. Chooses to apply for or be included in the payment, *and*
2. Meets the requirements for an essential person outlined in AFDC-2100.

V. 185% Rule

If the gross income of the assistance unit exceeds 185% of the Need Standard (Table 3) for the number of persons in the assistance unit, deny or terminate assistance.

If the gross income of the assistance unit equals or is less than 185% of the Need Standard (Table 3) for the number of persons in the assistance unit, proceed to VI.

NOTE: Apply the 185% rule at the time of application, review, or change in situation. Never apply the 185% rule to a lump sum during the period of ineligibility. However, do apply the 185% rule to income remaining from a lump sum in the first month of eligibility. See AFDC-2350.

A. What Income is Counted in the 185% Rule?

1. All countable gross earned and unearned income listed in AFDC-2350 for each assistance unit member. To calculate the gross income, use the same base periods as required in AFDC-2350.

   If an assistance unit receives direct child support, verify whether additional child support was also paid through IV-D. See 3. below.

   If so and the verified amount paid toward the IV-D obligation is $50 or more, count the entire amount of the direct child support received. If the verified amount paid toward the IV-D obligation is less than $50, subtract the amount paid from $50. Disregard the difference from the direct child support to determine countable income.

   If no child support is routed through IV-D Accounting for the assistance unit, disregard up to $50 of the direct child support received.

2. All countable gross earned income of a child in the assistance unit after the six month

disregard period for a full-time student. Use the same base period for computing gross income as required in AFDC-2350.

NOTE: Count a child's income after the six months disregard period, without regard to his student status, in the 185% rule with one exception. Do not count income paid to a child a/r who is participating in JTPA.

3. Child Support Routed Through IV-D Accounting – Verify the child support paid for the base period which is the second month prior to the payment month. Subtract $50 or the entire amount if less than $50 from the amount of child support paid for the 185% rule. Do not count arrearage payments.

   To verify the child support paid, use the report from the clerk of court's office or contact that office.

4. Deemed income from a stepparent unless he receives SSI or is in another assistance unit.

5. Deemed income from a parent to a minor mother unless the parent receives SSI.

6. Deemed income from a legal guardian to a minor mother unless the legal guardian receives SSI or is in another assistance unit.

7. Deemed income from a parent who is excluded from the assistance unit to a child unless the parent receives SSI.

B. Child care expenses paid by an a/r to a person in the assistance unit is not considered income to the assistance unit. Therefore, it is not counted as income when applying the 185% rule.

C. Do not count the AFDC payment.

VI. Calculating the Payment

To calculate the payment for applications and ongoing cases, you must:

A. Compute countable net income for the assistance unit according to the regulations in AFDC-2350, and

B. Subtract the countable net income from the Payment Standard (Table 4) for the number in the assistance unit. If the difference is $10.00 or more, authorize a payment rounded down to the lowest dollar. If the difference is $.01 to $9.99, authorize AFDC at $0 payment.

VII. Special Budgeting Procedures

A. Ineligible Parent Who is Excluded from the Assistance Unit and Whose Needs are Not Considered in Calculating a Stepparent's Income

* * * * *

NEED STANDARD BY NUMBER IN THE BUDGET/ASSISTANCE UNIT

Number in Budget/ Assistance Unit	1	2	3	4	5	6	7
Need Standard	$296	388	446	488	534	576	616

Number in Budget/ Assistance Unit	8	9	10	11	12	13	14
Need Standard	$642	670	708	740	778	816	854

For *each person* in the budget/assistance unit in excess of 14, add $38 to the Need Standard for 14.

TABLE 1

INDIVIDUAL NEED STANDARD FOR NUMBER IN THE BUDGET/ASSISTANCE UNIT

Number in Budget/ Assistance Unit	1	2	3	4	5	6	7	8	9	10
Individual's Needs	$296	194	149	122	107	96	88	80	74	71

If there are more than 10 individuals, determine the individual's needs by dividing the Need Standard by the total number of people in the budget/assistance unit and round to the nearest dollar.

TABLE 2

185% OF NEED STANDARD

Number in Assistance Unit	1	2	3	4	5	6	7
185% of Need	$548	718	825	903	988	1,066	1,140

Number in Assistance Unit	8	9	10	11	12	13	14
185% of Need	$1,188	1,240	1,310	1,369	1,439	1,510	1,580

If dependents exceed 14, add $70 for each person in excess of 14.

Table 3

PAYMENT STANDARD BY NUMBER IN THE ASSISTANCE UNIT

Number in Assistance Unit	1	2	3	4	5	6	7
Payment Standard Allowance	$148	194	223	244	267	288	308

Number in Assistance Unit	8	9	10	11	12	13	14
Payment Standard Allowance	$321	335	354	370	389	408	427

For each person in the assistance unit in excess of 14, add $19 to the payment standard allowance for 14.

Table 4

FOOD ALLOWANCE FOR ASSISTANCE UNIT MEMBER TEMPORARILY ABSENT FROM HOME

Number in Assistance Unit	1	2	3	4	5	6	7
Food Allowance Per Person	$76	70	66	63	60	60	57

Number in Assistance Unit	8	9	10	11	12	13	14 & Over
Food Allowance Per Person	$57	57	57	57	57	57	57

Table 5

NORTH CAROLINA)
) **AFFIDAVIT**
WAKE COUNTY)

I, Dianne Thomas, being duly sworn, do depose and say:

1. I live at 914 E. Lane Street, Raleigh, North Carolina.

2. I have two children: Crystal, age 9, and Sherrod, age 7.

3. I am 32 years old. Although I look constantly, I have been unable to find gainful employment.

4. James Edward Shaw is the father of Crystal. By virtue of a Wake County Court Order, 78 CVD 5056, Mr. Shaw is required to pay $20 a week toward Crystal's support. He almost never complies with the Order, however, and Crystal has been on public assistance for her whole life.

5. John Pennington is the father of Sherrod. Although there is no civil court order requiring him to do so, Mr. Pennington has regularly paid $200 a month in child support for Sherrod.

6. Prior to October, 1984, I received an AFDC grant for myself and my daughter Crystal in the amount of $194.

7. On October 15, 1984, I received a letter notifying me that if I did not reapply for AFDC and include my son Sherrod in the application, the AFDC for Crystal would be terminated.

8. I did not reapply for AFDC and my assistance was terminated. The reason I did not reapply is that Sherrod's father had on an earlier occasion threatened to harm me physically if I put his son on welfare. He also threatened to attempt to obtain custody of Sherrod.

9. I asked for a fair hearing to challenge the termination of AFDC. The state hearing officer upheld the decision of the county to terminate my AFDC.

10. Because I had no money with which to support Crystal, I finally reapplied for benefits in February, 1985. I included Sherrod on the application as I was required to do, and signed an assignment of Sherrod's support rights to the state.

11. As of April 11, 1985, John Pennington began to withhold the child support for Sherrod. He informed me that as long as I was going to use Sherrod's support money to keep up my daughter Crystal, he would continue to withhold the support.

12. Because I was receiving $200 a month for Sherrod, my AFDC grant was reduced to $73 a month. I could not support Crystal on this amount, so I was forced to use some of Sherrod's support to meet Crystal's needs.

Since my AFDC was terminated in November, 1984, I have been unable to purchase clothing and other necessary items for my children. Our phone service was disconnected in December because I could not pay the bill. I currently have overdue accounts for lights, and gas.

14. Because I have been unable to support both children, members of my family have been providing some assistance. They have their own families and obligations, however, and cannot continue supporting me on an indefinite basis.

This the 2nd day of May, 1985.

/s/ DIANE THOMAS
Dianne Thomas

SWORN TO and subscribed before me this 2nd day of May, 1985.

/s/ GERALDINE B. SADEN
NOTARY PUBLIC

My Commission Expires: August 20, 1985

Attachments:
1. Notice Regarding Standard Filing Unit.
2. Notice of Administrative Decision.

NORTH CAROLINA)
) **AFFIDAVIT**
WAKE COUNTY)

I, Mary Medlin, being duly sworn, do depose and say:

1. I live at 952 Lipscomb Court, Raleigh, North Carolina.

2. I have four children: Anthony Medlin, age 14; Roderick Medlin, age 13; Karen Medlin, age 10 and Jermaine Medlin, age 1.

3. I am 30 years old. I have been unable to find a full or part-time job, and thus do not have any earned income.

4. John Sanders is the father of Anthony Medlin and Roderick Medlin. His paternity has never been legally established and he has never supported Anthony or Roderick.

5. Bobby Harrington is the father of Karen Medlin. On January 4, 1980, he signed a Voluntary Support Agreement in Wake County 80 CVD 0053, agreeing to pay $39 a week. During early 1984, he regularly paid about $320 every three months. On August 20, 1984, the court ordered that he pay $200 a month, with $40 a month assigned to arrearages which had built up and $160 a month to current support. He began paying $200 a month in September, 1984.

6. James Richardson is the father of Jermaine. Since Jermaine was born, Mr. Richardson has provided direct support to his son, purchasing clothing and diapers, contributing to my household bills and paying me $50 cash as child support. A criminal action for support in Wake County, 85 CR 10961 is currently pending against him, because he has refused to sign a voluntary support agreement.

7. Prior to October, 1984, I received AFDC for myself and my two older children, in the amount of $223.

8. After October 1, 1984, I was informed by the Wake County Department of Social Services that my AFDC grant would be terminated unless I added Karen and Jermaine to the application.

9. Although I did not want to put Karen or Jermaine on AFDC, I did apply for them because it was the only way I could receive any income for myself and my other two children.

10. After I applied with everyone on the application, my whole grant was terminated. The Department of Social Services informed me that because I received $200 in child support for Karen and $50 in child support for Jermaine, my whole family was ineligible.

11. When I added the two younger children to the AFDC application, I was required to sign an Assignment of Rights to Support form (DSS-1201) on their behalf. This assigned their support to the North Carolina Department of Human Resources.

12. Because both Bobby Harrington (Karen's father) and I objected to the state taking Karen's child support money, I agreed to relinquish custody of Karen to her father. She is, therefore, no longer on my AFDC grant. I signed a Consent Agreement allowing him to suspend his support payments.

13. After I let Karen go live with her father, I reapplied for AFDC for Anthony, Roderick and Jermaine. My current grant amount is $215 per month. This is the grant for four persons—$244—reduced by $29 per month because Anthony is temporarily out of the home. I also receive $50 per month for Jermaine's support from James Richardson, which I am allowed to keep because of the "$50 disregard."

This the 3rd day of May, 1985.

/s/ MARY MEDLIN

Mary Medlin

SWORN TO and subscribed before me
this 3rd day of May, 1985

/s/ GERALDINE B. SANDERS

Notary Public

My Commission Expires: August 20, 1985

Attachments:

1. Child Support Order regarding Karen Medlin.
2. Consent Order regarding Suspension of Karen's Support.
3. Assignment of Rights to Support regarding Jermaine Medlin.

NORTH CAROLINA)
) **AFFIDAVIT**
WAKE COUNTY)

I, Joyce Miles, being duly sworn, do depose and say:

1. I live at 1338 Branch Street in Raleigh, North Carolina.

2. Living with me there are my five children: DeAngela Allen, age 17; Felicia Allen, age 14; Larry Miles, age 10; Johnetta Miles, age 6; and Kisha Miles, age 5.

3. I am 34 years old. Although I have been looking for work, I do not have a full or part-time job for which I earn wages.

4. The father of my two younger children is John Brown. No legal paternity determination was ever made with regard to him and he has never been ordered to pay support. He has never supported these two children.

5. The father of Larry Miles, Jr. is Larry Miles. He was originally ordered to pay support pursuant to Wake County 76 CR 64672. As of October 31, 1983 he was $4,803 in arrears. On July 18, 1984, he signed a Voluntary Support Agreement and Order in Wake County, 84 CVD 4576 to pay $108 per month toward current support and $22 a month toward the arrearages.

6. The father of the two oldest children is Arthur Allen. Pursuant to Wake County 83 CVD 3122, he regularly pays child support of $189 per month for his children.

7. Prior to October, 1984, I was receiving AFDC in the amount of $244 per month for myself and my three younger children. The two older children were receiving $189 per month child support from their father.

8. After October, 1984, the Wake County Department of Social Services required me to add my two older

children to the AFDC application. I was informed that my entire grant would be terminated unless I reapplied and included all the children.

9. Although I did not want to put my two older children on AFDC, because they are adequately supported, I did so because it was the only way I could receive any income for myself and the three younger children.

10. When I added the two older children to the AFDC application, I was required to sign an Assignment of Rights to Support form (DSS 1201—attached) on their behalf. This assigned their support to the North Carolina Department of Human Resources.

11. Because of this Assignment, my older children do not receive the $189 child support they are entitled to receive from their father. It is diverted by the Clerk of Court to the Department of Human Resources.

12. With myself and the three younger children on the AFDC grant, my payment was $244 a month. With all five children on the grant, my payment is $288 a month. (I am currently receiving only $278 per month because the Department of Social Services is collecting an overpayment.) I also receive a $50 monthly check, called the child support disregard.

13. Because of the loss of most of the child support, I have been unable to provide for the two oldest girls as I was able to before. I have been unable to purchase such things as class rings, shoes and clothing.

This the 7th day of May 1985.

/s/ JOYCE H. MILES

Joyce H. Miles

SWORN TO and subscribed before me
this 2th day of May, 1985

/s/ GERALDINE B. SANDERS

Notary Public

My Commission Expires: August 20, 1985

Attachments:

1. Support Order regarding Felicia and DeAngela Allen.
2. Support Order regarding Larry Miles, Jr.
3. Assignment of Support Rights of Felicia and DeAngela.
4. Assignment of Support Rights of Larry, Johnetta and Kisha.

NORTH CAROLINA)
) **AFFIDAVIT**
WAKE COUNTY)

I, Arvis Waters, being duly sworn, do depose and say:

1. I live at 2507-63 S. Roxboro Street in Durham, North Carolina.

2. Living with me there are my five children: Allen Waters, Jr., age 10; Andre Waters, age 8; Alise Waters, age 7; Bernard Williams, Jr., age 2; and Aaron Williams, age 1.

3. I am 29 years old. I attend school full-time at North Carolina Central University, participate in a work-study program and take care of my children. As a result, I do not have a full or part-time job for which I earn income.

4. The father of my three oldest children is Allen Waters. He pays no support for his children. Because of his extremely violent behavior, I have been exempted from the requirement that I assist the Department of Social Services in obtaining support from him.

5. The father of the two youngest children is Bernard Williams. He regularly pays child support of $45 per week for this children. He pays this support pursuant to an Order of the Family Court of the State of New York, County of Bronx, docket number P-78667/83, dated March 23, 1984.

6. Due to my lack of income or child support for the three oldest children, I applied for AFDC benefits for myself and three oldest childen in August, 1984. Before the application was completed however, I was informed by my eligibility worker at the Durham County Department of Social Services that my two youngest children must also be included in the AFDC application.

7. Although I did not want to put my two youngest children on AFDC, because they are adequately supported, I did so because it was the only way I could receive any income for myself or the three oldest children.

8. When I added the two youngest children to the AFDC application, I was required to sign an Assignment of Rights to Support form (DSS 1201—attached) on their behalf. This assigned their support to the North Carolina Department of Human Resources.

9. Because of this Assignment, my youngest children do not receive the $45 weekly child support they are entitled to receive from their father. It is diverted by the Clerk of Court to the Department of Human Resources.

10. With myself and the three oldest children on the AFDC grant, my payment would have been $244 a month. With all five children on the grant, my payment is $288 a month. Although I am entitled to receive a $50 monthly check, called the child support disregard, I have not been receiving this.

11. I appealed the decision requiring me to add my two youngest children to the AFDC grant and sign an assignment of their child support at a State Administrative hearing. On February 21, 1985, I received a Notice of Decision which upheld the County Department's decision that I must include my youngest two children in the AFDC application and assign their support to the state.

12. Due to only receiving a total of $288 per month for me and my five children to live on, I am not able to provide my children with many of the things I would like to. For example, I can never buy my children new clothes and even though I keep my children clean, they often aren't dressed the way I would like or the way other children at day care are. Also, there is no money left after necessary bills are paid and therefore I can never buy any toys or special things for them like other children in the neighborhood have. Next week is the birthday of one of my children and I cannot even afford a birthday present. If I got the support money for my two younger children, I would be able to at least buy a few things for them other

than absolute necessities and then they wouldn't feel so left out. Also, my youngest children need a car seat and a high chair and I cannot afford to buy either.

This the 9th day of May, 1985.

/s/ ARVIS WATERS
Arvis Waters

SWORN TO and subscribed before me
this 9th day of May, 1985

/s/ WARNELLA A. WILEY
Notary Public

My Commission Expires: October 10, 1988

Attachments:
1. Support Order regarding Bernard and Aaron Williams.
2. Assignment of Support Rights of Bernard and Aaron.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS,

v.

PHILLIP J. KIRK, SECRETARY, THE DEPARTMENT OF HUMAN RESOURCES IN HIS OFFICIAL CAPACITY AND C. BARRY MCCARTY, CHAIRMAN, SOCIAL SERVICES COMMISSION, IN HIS OFFICIAL CAPACITY, DEFENDANTS,

v.

MARGARET HECKLER, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES IN HER OFFICIAL CAPACITY, THIRD PARTY DEFENDANT.

THIRD-PARTY COMPLAINT

PRELIMINARY STATEMENT

In this action the movants, members of the plaintiff class, seek an order precluding the defendants from including child support income received from the parent of a sibling from being utilized to determined the eligibility of all family members to receive AFDC. At issue is whether movants are eligible for AFDC pursuant to Title IV-A of the Social Security Act, 42 U.S.C. § 601, *et seq*, and accompanying federal regulations. The movants allege that child support income, pursuant to prior ruling in this case, may not be considered income available for the family and that, properly interpreted, 42 U.S.C. § 602(a)(38) is consistent with this position. Further, they allege, that should this not be so, that 42 U.S.C. § 602(a)(38) is unconstitu-

tional. The defendants defend by asserting that 42 U.S.C. § 602(a)(38) has modified the prior decision of this court in that any income, including child support, must be counted to determine AFDC eligibility and that such an interpretation is constitutionally and statutorily permitted. Further, the defendants are required by the interim regulations of the third-party defendant, the federal official who administer the AFDC program, to include the parent and related siblings living in the household in the assistance unit and to include any income of or available to one member of that unit, including child support, in determining eligibility. North Carolina must follow the federal interpretation or it risks incurring the financial actions of federal nonparticipation in payments that federal officials determine to be incorrectly awarded. Accordingly, the third-party defendant has caused the defendants to apply the standard filing unit. Therefore, if this rule is illegal the defendants must provide AFDC to the plaintiffs and the third party defendant is liable to the defendants for part of the movants claims against defendants.

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1334(3) and 28 U.S.C. § 1334(4). Declaratory relief and injunctive are authorized pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 2202. A third-party complaint is permitted.

PARTIES

2. The movants are Dianne Thomas, and her two children Sherrod and Crystal; Mary Medlin and her four children Anthony, Roderick, Karen and Jermaine; Joyce Miles and her five children DeAngela, Felicia, Larry, Johnetta and Kisha; and Arvis Waters and her five children Allen, Andre, Alice, Bernard and Aaron. A copy of their motion is attached hereto as Exhibit A.

3. Defendant Philip J. Kirk is the Secretary of the North Carolina Department of Human Resources and, as such, is the successor in interest to the former defendants in this action. He is responsible for administering the Aid for Families with Dependent Children program throughout North Carolina in conformity with the Social Security Act and implementing regulations.

4. Defendant C. Barry McCarty is Chairman of the Social Services Commission which is responsible for promulgating regulations for implementing social services program. He is the successor in interest to the former defendants.

5. Third party defendant Margaret Heckler is the Secretary of the United States Department of Health and Human Services. She is responsible for administering the AFDC program in North Carolina and throughout the country in conformity with the Social Security Act. She is responsible for directing and instructing state officials concerning the proper construction and implementation of the Social Security Act and the federal AFDC regulations.

6. The third-party defendant is directly responsible for the defendants's actions which are the subject of the plaintiffs' complaint.

7. The third-party defendant has acted under color of law at all times material to this action.

STATUTES AND REGULATIONS

8. AFDC is a joint federal and state public assistance program established by Title IV-A of the Social Security Act, 42 U.S.C. § 601, *et seq.* North Carolina participates in AFDC.

9. AFDC is available to financially assist families with dependent children. In order to receive AFDC the family's resources must be examined to determine financial

eligibility. The plaintiffs allege that because of the standard filing unit they were incorrectly terminated or denied benefits that they were entitled to receive.

10. Although each state can determine the standard of need and payment amount for each assistance unit, each state must follow the rules of the Aid to Families with Dependent Children Program in determining eligibility for the AFDC program. 42 U.S.C. § 601, *et seq.*

11. AFDC regulations require that the parent and all minor children who are brothers and sisters and who live together must be included in the same assistance unit and further, that any income of or available for any of the above must be included in making the eligibility determination. This rule is called the standard filing unit (SFU). 42 U.S.C. § 602(a)(38); 45 CFR § 206.10.

12. In June 1971 North Carolina's AFDC program employed a different method of determining eligibility. Then, and until October 1, 1984, parents were permitted to opt not to include a sibling in an assistance unit, and child support income was not included to determine financial eligibility unless and until said child was actually included in the budget unit.

FACTS

13. Prior to October 1, 1984, the third-party defendant issued interim regulations and caused to be communicated to the defendants information that, as a result of the adoption of the Deficit Reduction Act (DEFRA), the parent and all siblings who live together must be included in the same assistance unit and that any income, including child support payments, of or available for any of the above must be included in making the eligibility determination. The third-party defendant relied on 42 U.S.C. § 602(a)(38) to support its instruction.

14. North Carolina cannot decline to follow the third-party defendant's direction concerning the proper operation of the AFDC program. If North Carolina does so, the third-party defendant may disallow the federal financial share of payments to AFDC recipients who do not qualify under the third-party defendant's construction of Social Security Act and its regulations. The federal share of these payments is approximately 68%.

15. The movant class members have moved in this case to enjoin defendants from including the parents and all children living in the household in the assistance unit and from including income received from the legally obligated parent of one of the children in determining financial eligibility for the rest of the family members. Further, movants, in the alternative, seek to have the standard filing unit statute and regulations declared unconstitutional.

16. The defendants have been informed by the third-party defendant that HHS would not fully participate in any payments which the State of North Carolina may be required to make on account of the Court's order in this case.

17. The defendants are at present in compliance with federal regulations with respect to plaintiffs eligibility for AFDC. However, should this court order preliminary or permanent relief for the plaintiffs, the court should specifically declare the responsibilities of the state and federal agencies and should order the third party defendant to provide whatever funds may be necessary to meet her responsibilities to the plaintiffs and defendants.

COUNT ONE:
DECLARATORY RELIEF

18. An actual and present controversy exists between the defendants and third-party defendants in that the

defendants are exposed to multiple and conflicting liability because of the third-party defendant's interim regulations and instructions concerning the standard filing unit and 42 U.S.C. § 602(a)(38) differ from the movants construction of 42 U.S.C. § 602(a)(38). The third-party defendant is liable to the defendants for approximately 68% of defendants' AFDC payments, but will not participate in payments ordered by the court. The defendants are entitled to a declaratory judgment against the third-party defendants and an order requiring the third-party defendant to participate in any payments which the Court may order the defendants to make. The defendants require and are entitled to a declaratory judgment binding on the third-party defendant construing 42 U.S.C. § 602(a)(38).

COUNT TWO:
INJUNCTIVE RELIEF

The defendants face continuing irreparable harm from the third-party defendant's refusal. Therefore, the defendants are entitled to a permanent mandatory injunction ordering the third-party defendant to participate in any payments made by the defendants as a result of this decision.

PRAYER FOR RELIEF

WHEREFORE, the defendants pray that the court:

A. Assume jurisdiction over the matters complained of in this third-party complaint.

B. Declare the meaning of 42 U.S.C. § 602(a)(38).

C. Enjoin the third party defendant to pay the federal share of any payments by the defendants to the plaintiff arising out of this action.

D. Award the defendants such other relief as is proper and just.

This the 3rd of July, 1985.

LACY H. THORNBURG
Attorney General

Steven Mansfield Shaber
Assistant Attorney General

/s/ LEMUEL W. HINTON
Lemuel W. Hinton
Assistant Attorney General

Clifton H. Duke
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-4618

COUNSEL FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS,

v.

CLIFTON M. GRAIG, ET AL., DEFENDANTS.

DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT

Defendants respectfully move the court pursuant to Rules 60(b)(5)&(6) of the Federal Rules of Civil Procedure, for relief from the judgment entered in this case and respectfully move that the court vacate the injunction against them.

Rule 60(b) provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, of proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

These rules, particularily rule 60(b)(5), are "little more than a codification of the universally recognized principle that a court has continuing power to modify or vacate a final decree." 11 Wright and Miller, *Federal Practice and Procedure,* § 2961, p. 599. A change in applicable statutory law is a proper reason to modify a judgment. *The System Federation No. 91, Railway Employees Department, AFL-CIO v. Wright,* 364 U.S. 642 (1961); *Pennsylvia v. Wheeling and Belmount Bridge Company,* 59 U.S. (18 How.) 421 (1856). This power exists even if it

is not reserved in the original decree. *U.S. v. Swift & Co.*, 286 U.S. 106, 114 (1932).

The reason for this court's 1971 decision in the case, and the basis for its injunction, is set forth in the following language:

> Both under the most rational interpretation of 42 U.S.C. § 602(a)(7) and under the State's own regulations, it is improper to include as family resources support payments belonging individually to [plaintiff's child, who] is not a proper member of the group because he is not a "needy' child under the Social Security Act.

Gilliard v. Craig, 331 F.Supp. 587, 593 (W.D.N.C. 1971) However, effective October 1, 1984, Congress amended the Social Security Act by adopting 42 U.S.C. § 602(a)(38) which provides as follows:

> . . .that in making the determination under [42 U.S.C. § 602(a)(7)] with respect to a dependent child. . . the State agency shall (except as otherwise provided in this part) include-
>
> (A) any parent of such child, and
>
> (B)any brother or sister of such child, if such brother or sister meets the conditions subscribed clauses (1)&(2) of [42 U.S.C. § 606(a)], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family.

Thus Congress explicitly modified the Social Security Act in a way which repeals this court's earlier grounds for decision in this case. That being so, defendants are entitled to relief from the court's judgment.

A further explanation of the defendants' reasons for

deserving relief from the judgment will be set forth in their memorandum in reply to the plaintiffs' motion for further relief, which is due to be filed July 30, 1985.

WHEREFORE, pursuant to Rule 60(b)(5)&(6), the defendants move that the court vacate its judgment and injunction in this case.

Respectfully submitted, the 10 day of July, 1985.

LACY H. THORNBURG
Attorney General

/s/ STEVEN MANSFIELD SHABER
Steven Mansfield Shaber
Assistant Attorney General

HENRY THOMAS ROSSER
Assistant Attorney General

/s/ LEMUEL HINTON (???)
Lemuel Hinton
Assistant Attorney General
Department of Justice
Post Office Box 629
Releigh, North Carolina 27602
Telephone: (919) 733-4618

AFFIDAVIT OF KAY C. FIELDS

Now comes the undersigned Kay C. Fields and, being duly sworn, deposes and says as follows:

1. I am at present the Chief, Assistance Payments Section, Division of Social Services, North Carolina Department of Human Resources. As such I am responsible for the implementation of federal and State law, regulations, and policy concerning Aid to Families with Dependent Children (AFDC). I have held this position since September, 1978. I also worked in AFDC from 1973 through 1975.

2. I am familiar with *Gilliard v. Craig*, its implementation, and its effect on AFDC in North Carolina.

3. I am familiar with 42 U.S.C.§ 602(a)(38) which was passed as part of the Deficit Reduction Act (DEFRA) and became effective on October 1, 1984. Section 602(a)(38) obligates all states, including North Carolina, to use the standard filing unit for determining AFDC eligibility.

4. The purpose of this affidavit is to explain the effect of 42 U.S.C. § 602(a)(38) on North Carolina's AFDC program in light of *Gilliard*.

5. As background, it must be understood that AFDC pays assistance to needy families. See AFDC-2360 (effective July 1, 1985) (copy attached). The threshold question is the question of who must be included in the budget unit. The next question is whether the budget unit is needy. The final question is how much assistance the family is entitled to receive.

6. Prior to 42 U.S.C. § 602(a)(38), effective, October 1, 1984, heads of households had the choice to include or exclude people who might be eligible for AFDC. This was a matter of federal regulation 45 C.F.R. § 206.10. The U.S. Department of Health and Human Services (HHS) (formerly Health, Education and Welfare) recognized this right of choice, and did not act against North Carolina on account of *Gilliard*.

7. The principal effect of 42 U.S.C. § 602(a)(38) is to require that all natural or adopted siblings and half-siblings, who live in the same home, must be included in the budget unit if any child in the home applies for or receives AFDC. This is my firm and clear understanding of the statute. It is the official policy of North Carolina in implementing the statute. And I know from training sessions and discussions with HHS officials in Washington and Atlanta that this is the official policy of the federal government as well. Most recently, I met in Washington with Mr. Gray Ashcraft and attorneys for the Office of Family Assistance, HHS, who confirmed that this is the federal position concerning 42 U.S.C. § 602(a)(38).

8. It should be noted that 42 U.S.C. § 602(a)(38) does not require North Carolina to include all the people previously excluded under *Gilliard*. Step-brothers and step-sisters are not included. Neither are cousins living with their grandmother.

9. Having established who must be in the budget unit in accordance with 42 U.S.C. § 602(a)(38), the next step is to determine whether the unit is needy. This is determined with reference to the need standard set each year by the General Assembly. Almost all income to the budget unit members counts against the need standard. Families pass the needs test if their gross income is less than 185% of the need standard.

10. After determining need, it is necessary to calculate the payment, if any. The payment standard varies with budget unit size. It is exactly one half of the need standard, a fact which reflects the existence of other forms of public assistance, notably food stamps and Medicaid and, often SSI, rent subsidies, and energy assistance. To calculate the AFDC payment, certain income which was counted against the needs standard may now be excluded. (This process is rather like the difference between business expenses which are deducted to determine adjusted gross

income and other deductions which reduce AGI to taxable income.) Insofar as the payment standard exceeds countable monthly income, the family will recieve a monthly AFDC check, provided the minimum payment is $10.00. In other words, AFDC supplements countable income.

11. Child support payments to a budget unit member are always countable income. 10 N.C.A.C. 49B .0308 attached hereto. This has always been true, even under *Gilliard,* which, of course, excluded certain children from the budget unit, but did not deny that if such a child chose to be included (perhaps to receive Medicaid), his child support income would have to be counted in determining eligibility.

12. The AFCD program does not demand that an AFDC mother spend any particular part of her budget unit's income on any particular child. She has the discretion to spend her family's income as she sees fit. Neither does the AFDC program demand that a child spend or donate any part of his income to his siblings. However, I have no doubt that AFDC mothers use family income from whatever source for all their children, as necessary or desirable. I base this opinion on my long familiarity with the program. For them to do otherwise would be almost unthinkable and would exacerbate their difficult situations.

13. Many AFDC children do receive child support, and child support payments are treated differently from other income. By law, AFDC parents must assign child support payments to the State for collection. 45 C.F.R. § 232.11. This is the child support enforcement program, Title IV-D of the Social Security Act. After the child support income is assigned to the State, the family receives a full AFDC payment each month, less any income other than child support. The State collects the child support, pays the first $50.00 of it to the family as a "disregard" or "pass through", and retains the remainder, provided, of

course, it is less than the AFDC payment. In other words, once the child support is assigned to the State, it stops being countable income, 10 N.C.A.C. 49B .0308, for purposes of determining the amount of the AFDC check.

14. The advantages of the child support program include relieving the mother of the burden of trying to enforce child support and providing her family a larger regular monthly income since the income will not fluctuate depending on the time or amount of the support payment.

The standard filing unit simplifies AFDC program administration by keeping children from moving on or off the assistance rolls as their outside income fluctuates. The standard filing unit also reserves AFDC for the most needy.

15. The AFDC payment standard goes up at a decreasing rate. Payment for a family of three (mother and two children) is $246.00. Payment for four is $269.00. This is not to say that the individual payment standard for the third child is only $23.00 ($269.00 – $246.00). The child's individual payment is the same as each of the others, $67.00 ($269.00 ÷ 4). This reflects the fact of shared household expenses.

16. Keeping in mind that the need standard is twice the payment standard (See paragraph 10. above.), the third child's individual monthly need is $135.00.

17. Applying these facts to children with outside child support who live with siblings in a family receiving AFDC, it is clear that many such children will be receiving relatively regular support in an amount greater than the increase in the AFDC payments which their families would receive if they were in the AFDC budget units. However, it is also clear that many of these will have child support payments which are less than their individual share of the AFDC payment. Still more have less than their individual share of the need standard. So, even if it were proper to assess need individually, instead of assessing it for the group, these children would be needy.

18. Not only does 42 U.S.C. § 602(a)(38) require North Carolina to include all brothers and sisters living in an AFDC home in the standard filing unit, it expressly requires North Carolina to count all the "income of or available for" these brothers and sisters.

19. I have been infomed by federal officials that if North Carolina were to disregard 42 U.S.C. § 602(a)(38), the federal government would not participate financially in these payments. This would be consistent with the federal government's refusal to participate financially in AFDC payments to families who have income in the form of *Alexander v. Hill* penalty payments. The annual cost to the State would be approximately $4,332,000.00. See, Memorandum of Quentin Uppercue, July 17, 1985 (attached hereto). The federal government would not pay its usual 68% share of this cost. Furthermore, failure to follow 42 U.S.C. § 602(a)(38) as implemented by HHS would expose North Carolina to quality control errors. At present the State's error rate is about 2.4%. Should the error rate exceed the tolerance level of 3.0%, the State would lose federal funds for each .1% the error rate rose above the limit. North Carolina's best estimate is that the error rate would increase by 2.6%, causing sanctions of $3,100,000 annually. See Memorandum of Quentin Uppercue (attached).

20. Under 42 U.S.C. § 602(a)(38), it is estimated that North Carolina will save $4.3 million in AFDC payments. Of this, about $2.9 million is federal money and the remainder state and county funds. In addition, the standard filing unit is simpler to handle for county eligibility workers, because first, it requires that all children be in the unit and eliminates the need to consider separately the usefulness of including each individual child. Second, it eliminates the many instances where mothers with children whose fathers failed to pay support for a given month come in and seek retroactive assistance for that child to compensate for the missed support payment.

21. In my opinion, the standard filing unit is fairer in that is treats AFDC families of like size equally. It prevents families from sheltering outside child support by excluding the recipient from the budget unit, something which other families cannot do. It also reflects the actual practice in AFDC families of sharing all income as needed among all children.

22. In my deposition July 17, 1985, I was asked to produce a report showing AFDC payments and administrative costs for each month October 1983, through June 1985. That chart is attached as Exhibit 4 to my deposition and is also attached to this affidavit. This chart must be read in light of many other factors affecting AFDC payments. Although the standard filing unit became effective in October, 1984, people were not required to be removed from the rolls until December. The difference between the October payment and the December payment is approximately $393,000, which is close to the annualized savings of $4.3 million. The January increase in payments is a common result of changes in employment for this time of year. Payments generally stayed up until June when summer employment caused a reduction.

23. Finally and parenthetically, let me explain the purpose of the individual need standard described in the Affidavit. The need standard is defined as the amount of money the State has determined is needed to meet a minimal standard of living for a family of a specified size. The individual need standard is determined by dividing the standard for a specified size by the number in the budget unit. The need standard is used to determine:

a. Initial eligibility (185%) rule.

b. Needs of a parent who is excluded from the assistance unit because he does not meet one or more of the eligibility requirements.

c. Needs of a parent(s) and others living in the home when deeming income to a minor mother.

d. Needs of a stepparent and other persons living in the home when deeming income from a stepparent.

e. Needs of an individual sponsor, his/her spouse, and other persons when deeming income to a non-exempt alien.

f. Dependent's need for work release.

g. Eligibility for the $30 and 1/3 disregard for an applicant who has not received in one of the four months prior to the month of application.

h. Needs of child when *Gilliard* is applied because the child is not affected by the standard filing unit rule.

KAY C. FIELDS
Kay C. Fields

Sworn to and subscribed before me, this
the 29th day of July, 1985

/s/ DONANNA L. BATES
Notary Public

My Commission Expires: 5/1/88

CHANGE NOTICE FOR MANUAL

Date July 19, 1985

Manual AFDC
Change No. 8-86

To: County Directors of Social Services

Effective: July 1, 1895 make the following changes(s) to AFDC Manual, Volume ____

On June 27, 1985, the 1985 session of the North Carolina General Assembly ratified Chapter 479 in Senate Bill 1, "An Act to Make Appropriations for Current Operations of State Department, Institution, and Agencies, and for Other Purposes," which results in two major changes in the AFDC Program. These changes are:

1. A 10% increase in the AFDC Standard of Need effective July 1, 1985. The Payment Standard will continue to be 50% of the Need Standard.

   Implementing instructions are included in DSS Administrative Letter Number PAP-1-86.

2. Authorization to provide AFDC to women beginning with their sixth month of pregnancy, regardless of whether they have children, and if they are otherwise eligible. This change is also effective July 1, 1985.

   Implementing instructions for this provision are contained in Change Number 6-86 to the AFDC Manual.

So as to comply with this legislation, AFDC-2360 is revised to include:

1. Budgeting instructions for an applicant/recipient (a/r) of pregnant women coverage. An a/r who is eligible for pregnant women coverage is always an assistance unit of one.
2. Revised Tables 1 through 5.

Remove AFDC-2360 and Tables 1-5. Insert the attached section and tables.

If you have questions, please contact your Income Maintenance Representative.

/s/ BONNIE M. CRAMER

Bonnie M. Cramer
Assistant Director for
Program Administration

KCF/dt
Attachments
DSS-2198 (8/76)
(DSS-ADM)-27A-72

North Carolina Department of Human Resources
Division of Social Services
Assistance Payments Section
AFDC Manual AFDC-2360

Transmitted by Change No. 8-86

Need Rev. 7-1-85

PAYMENT STANDARD BY NUMBER IN THE ASSISTANCE UNIT

Number in Assistance Unit	1	2	3	4	5	6	7
Payment Standard Allowance	$163	214	246	269	294	317	339

Number in Assistance Unit	8	9	10	11	12	13	14
Payment Standard Allowance	$354	369	390	407	428	449	470

For each person in the assistance unit in excess of 14, add $21 to the payment standard allowance for 14.

Table 4

FOOD ALLOWANCE FOR ASSISTANCE UNIT MEMBER TEMPORARILY ABSENT FROM HOME

Number in Assistance Unit	1	2	3	4	5	6	7
Food Allowance Per Person	$84	53	39	32	28	25	24

Number in Assistance Unit	8	9	10	11	12	13	14 & Over
Food Allowance Per Person	$23	22	21	20	20	20	20

Table 5

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION No. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS

v.

CLIFTON M. CRAIG, ET AL., DEFENDANTS

DECLARATORY OF JO ANNE B. ROSS

I, Jo Anne B. Ross, declare, certify, and state under penalty of perjury that the following is true and correct:

1. I am the Associate Commissioner for Family Assistance, Social Security Administration, Department of Health and Human Services (HHS). In this capacity, I have overall responsibility for the administration of the Federal Aid to Families with Dependent Children (AFDC) program under title IV-A of the Social Security Act. I make the following statements based upon personal knowledge attained in my official capacity.

2. The purpose of this affidavit is to 1) explain the history and operation of section 2640 of the Deficit Reduction Act of 1984 (DRA), which adds section 402(a)(38), 42 U.S.C. § 602(a)(38), to the Social Security Act, 2) explain the regulations implementing section 402(a)(38) and 3) describe the potential impact of the State's failure to comply with the law and regulations in this area.

3. Prior to 1984, there was no requirement that all co-resident family members be included in the filing unit for AFDC purposes. A family applying for AFDC assistance could, therefore, exclude from the filing unit those family members with income which would reduce or terminate

the family's AFDC benefits. In addition, in anticipation of a family member's receipt of additional income (such as Social Security benefits), the family could remove that individual from the filing unit.

4. In DRA, Congress recognized the need to offset projected massive budget deficits by further cutbacks in federally funded programs. H. Rep. No 98-861, 98th Cong., 2d Sess., House Ways and Means Committee, 1094 (1984).

5. In DRA, Congress enacted the first mandatory requirement regarding composition of the filing unit for AFDC assistance. Section 402(a) of the Act, 42 U.S.C. § 602(a), was amended by the addition of paragraph 38, which requires that the parents and siblings of an AFDC child must be included in the filing unit and have their income and resources considered available to the unit.

6. In 1982, 1983, and 1984, the Secretary of HHS submitted to the Congress proposed legislation to amend the AFDC program by mandating the inclusion of certain individuals in the AFDC filing unit. The language enacted by Congress as part of DRA is the same as the language proposed by the Secretary with minor technical changes.

7. The Secretary's 1983 proposed amendment became part of the draft of the Omnibus Reconciliation Act of 1983, Senate Bill No. 2062, 98th Cong. 1st Sess. *See* Senate Report No. 98-300 at 165 (1983). Subsequently, the proposal was incorporated into the Senate version of DRA. The Senate Committee on Finance Report, "Explanation of Provisions [of DRA] Approved by the Committee on March 21, 1984", 98th Cong. 2nd Sess., Sen. Com. Print 98-169, volume 1 at page 980 (April 2, 1984) states:

> **Present Law**
>
> There is no requirement in present law that parents and all siblings be included in the AFDC filing unit. Families applying for assistance may exclude from the

filing unit certain family members who have income which might reduce the family benefit. For example *a family might choose to exclude a child who is receiving social security or child support payments*, if the payments would reduce the family's benefits by an amount greater than the amount payable on behalf of the child. (Emphasis added.)

* * * *

Explanation of Provision

The provision approved by the Committee would require States to include in the filing unit the parents and all dependent minor siblings . . . living with a child who applies for or receives AFDC.

* * * *

This change will end the present practice whereby families exclude members with income in order to maximize family benefits, and will ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole.

8. The House of Representatives' version of DRA did not contain any provision covering this aspect of the AFDC. *See* 98 Cong. 2nd Sess., House Conference Report No. 98-861 at 1407, *reprinted* in 1984 U.S. Code Cong. & Adm. News 209. The Senate version required States "to include in the filing unit the parents and all minor siblings living with a dependent child who applies for or receives AFDC." The conference agreement follows the Senate amendment with a modification to pay a monthly disregard of $50 of child support. *Id.* On July 18, 1984, both Houses passed DRA, eliminating the previous policy of allowing families to exclude certain family members with income in order to become eligible for or to increase AFDC benefits.

9. On September 10, 1984, the Secretary published interim final regulations, 42 Fed. Reg. 35586 (1984), implementing the DRA changes, effective October 1, 1984. The regulations provides:

> For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:
>
> (A) Any natural or adoptive parent, or stepparent (in the case of States with laws of general applicability); and
>
> (B) Any blood-related or adoptive brother or sister.

49 Fed. Reg. 35599 (Sept. 10, 1984), codified at 45 CFR 206.10(a)(1)(vii).

10. HHS policy require that when a family applies for AFDC for a dependent child, all parents and all blood-related and adoptive brothers and sisters who themselves meet the age and deprivation requirements for AFDC, and who live in the household, must be included.

11. The only exceptions to this requirements are individuals who are excluded from AFDC eligibility due to a specific statutory provision barring their eligibility. For example, individuals who receive Supplemental Security Income benefits under title XVI of the Social Security Act are excluded from AFDC eligibility pursuant to section 402(a)(24) of the Social Security Act.

12. In determining the composition of an assistance unit, the State must include all parents and siblings not specifically excluded as discussed above, regardless of their income or resources. Only after that determination is made are total income and resources of all members of the assistance unit considered in determining the unit's eligibility for and the amount of the AFDC benefit.

13. I am aware of the initial decision of December 10, 1971 in the court action of *Gilliard, et al, vs. Craig, et al.* In that action, the court permanently enjoined the State

from reducing a family's AFDC benefit due to income, such as child support, received by family members who were not in the AFDC assistance unit. Until passage of DRA, compliance with the court's order would not have raised any issue of compliance with Federal statute or regulations. As described above, before passage of DRA, a family could chose to exclude certain family members from the assistance unit, and would have effectively prevented income of the excluded member from being considered in determining the AFDC benefit of the assistance unit.

14. Because DRA eliminate this option, we support the State in its implementation of section 402(a)(38). Should the State fail to include family members who were members of the class described in *Gilliard,* but who are now required to be included in assistance units, continued Federal funding of the State's AFDC program would be at risk. Similar problems would arise if the State included such individuals, but failed to consider their income or resources.

15. Federal regulations at 45 CFR 205.10(b)(3) provide that Federal financial participation is available for payments within the scope of federally aided public assistance programs made in accordance with a court order. Thus, when the Department is not party to a suit, Federal matching is not available if the State is ordered to make payments that the Department determines are not within the scope of the program. Court-ordered payments to a family which is permitted to exclude a member who is required to be included in the assistance unit pursuant to section 402(a)(38) would be considered to be outside the scope of the program and would not be matched if the Department was not a party to the suit. Refusal to match expenditures, as described above, would affect only those court-ordered payments.

16. In addition, if a State fails to comply with Federal requirements, the Secretary, pursuant to section 404(a)(2) of the Social Security Act, may seek further action against the State to withhold all federal funds for AFDC.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of July, 1985.

/s/ JO ANNE B. ROSS

Jo Anne B. Ross
Associate Commissioner
for Family Assistance
Social Security Administration
Department of Health and Human
Services

ATTACHMENT 16

AFFIDAVIT OF DAN MILES

The undersigned, Dan Miles, being first duly sworn, herein deposes and says:

1. That I am the Assistant Chief for Fiscal Operations in the North Carolina Child Support Enforcement (IV-D) Program.

2. That within the scope of my official duties I have access to information from the IV-D automated child support accounting system indicative of child support collections and disbursements for both AFDC and Non-AFDC recipients of IV-D services, and that I have access to statistical data concerning the number of individuals receiving IV-D services.

3. That in the period from October 1, 1984 through June 30, 1985, in both AFDC and Non-AFDC cases, an average of approximately 30% of individuals obligated to make child support payments paid an amount sufficient to equal or exceed their monthly support obligations, approximately 18% paid an amount less than their monthly obligations, and approximately 52% paid no support within any given month.

4. That in excess of 118,000 checks have been written to AFDC households for distribution of more than $5,397,000.00 as AFDC budget disregard for child support paid from October 1, 1984 through June 30, 1985, equating to an average monthly AFDC budget disregard payment of approximately $45.19 per month.

5. That most recently available statistics indicate the average child support obligation amount for AFDC cases to be $90.47 per month, of which 55% is paid on an average monthly basis, which would equate to payments of $49.76 per month.

6. That most recently available statistics indicate the average number of absent parents associated with an AFDC case to be 1.38, and the average number of children to be 1.78, as contrasted with an average number of absent parents for the named plaintiffs in this action of 2.4 and an average number of children for the named plaintiffs of 4.0.

7. That during the past three State fiscal years (July 1 through June 30, of the three-year period ending June 30, 1985) the following collections have been distributed to AFDC and Non-AFDC cases:

Fiscal Year	*AFDC Amount*	(% Total)	*NonAFDC Amount*	(% Total
82-83	15,876,980	(58%)	11,350,940	(42%)
83-84	21,596,696	(59%)	15,015,657	(41%)
84-85	21,899,012	(52%)	20,540,979	(48%)

8. That in the Eighth Annual Report to Congress, North Carolina ranked in the top half of the nation on three performance indices: AFDC collections per total administrative expenditures, Non-AFDC collections per total administrative expenditures, and AFDC collections per AFDC assistance payments; and that in the said report within the Southeast Region, North Carolina's respective ranking on the same performance indices was third, second, and first.

/s/ DAN MILES
Dan Miles

Sworn to and subscribed before this 29th day of July, 1985.

/s/ JUDY B. RHODES
Notary Public

My commission expires: 12-4-1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS,

v.

CLIFTON M. GRAIG, ET AL., DEFENDANTS.

DEFENDANTS' MOTION FOR THREE JUDGE COURT PURSUANT TO 28 U.S.C. § 2281, et seq.

The defendants respectfully move that this matter be heard by a three judge court pursuant to former 28 U.S.C. § 2281, *et seq.*

This action was decided June 10, 1971, by a three judge court consisting of Judge James B. McMillan, Judge Woodrow Wilson Jones and Judge Braxton Craven, Judge Jones dissenting. *Gilliard v. Craig,* 331 F. Supp. 587 (W.D.N.C. 1971).

At the time this case was heard and judgment was entered, 28 U.S.C. § 2281 provided as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by the administrative board or commission acting under state statute, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under Section 2284 of this title.

This statute was jurisdictional. *Morales v. Turman,* 430 U.S. 322 n.* (1977); *Goosby v. Osser,* 409 U.S. 512, 522,

n.8 (1973); *Ex parte Metropolitan Water Co.*, 220 U.S. 539, 545 (1911); 17 Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4235, p. 392.

The plaintiffs' present motion in the cause raises issues which can only be heard by a three judge court under the applicable statute. At issue is the constitutionality of state administrative orders under the Fifth, Fourteenth, and Tenth amendments of the Constitution. Notably, similar issues were raised in the complaint.

Section 2281 was repealed in 1976, P.L. 94-381, §§ 1&2, 90 Stat. 1119. However, the act repealing 28 U.S.C. § 2281 "shall not apply to any action commenced on or before the date of enactment." P.L. 94-381, § 7; 90 Stat. 1119, 1120. Because the plaintiff-movants are members of the class certified in this case, because they have chosen to bring their proceedings by a motion in the cause, and because 28 U.S.C. §2281 was jurisdictional, the former statute continues to apply to this case. *Morales v. Turman, supra,* at 322, n.*.

In addition, under 28 U.S.C. § 2284(b)(3), "a single judge shall not. . . hear and determine any application for a preliminary or permanent injunction or *motion to vacate such an injunction,* or enter judgment on the merits." (Emphasis added.) The present proceedings amount to a request to modify the injunction previously entered, because they ask the court to consider the effect of the new federal statute, 42 U.S.C. § 602(a)(38), on its previous decree. In addition, simultaneously with this motion for a three judge court, the defendants have moved for relief from the judgment pursuant to Rule 60(b) the Federal Rules of Civil Procedure. This motion is squarely within the jurisdiction of the three judge court, because after a three judge court has given its judgment it cannot be modified by a single judge. *Chapman v. Meier,* 420 U.S. 1, 13&14 (1975); *Molpus v. Fortune,* 311 F.Supp. 240, 244 (D.C. Miss. 1970), *affirmed* 432 F.2d 916 (5th Cir. 1970).

A federal three judge court has the power to reopen its decree after the expiration of the term. *American Insurance Company v. Lucas,* 38 F.Supp. 926 (D.C. Mo. 1941), *appeal dismissed,* 314 U.S. 575, *affirmed,* 129 F.2d 143, *cert. den.* 317 U.S. 687, *reh. den.,* 317 U.S. 712 (1943).

This is not a case of simple enforcement of the judgment, because the plaintiffs' and defendants' motions raise substantial constitutional questions to be decided. Thus, the case is distinguishable from such cases as *Allen v. County School Board of Prince Edward County,* 249 F.2d 462 (4th Cir. 1957), *cert. den.,* 355 U.S. 953 (1958).

WHEREFORE, for the foregoing reasons the defendants respectfully move that this matter be heard by a three judge court.

This the 16 day of July, 1985.

Respectfully submitted,

LACY H. THORNBURG
Attorney General

/s/ STEVEN MANSFIELD SHABER
Steven Mansfield Shaber
Assistant Attorney General

HENRY THOMAS ROSSER
Assistant Attorney General

/s/ LEMUEL HINTON (S.M.S.)
Lemuel Hinton
Assistant Attorney General
Department of Justice
Post Office Box 629
Releigh, North Carolina 27602
Telephone: (919) 733-4618

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS,

v.

PHILLIP J. KIRK, ET AL., DEFENDANTS.

ORDER

On August 9, 1985, the court denied defendants' motion that the outstanding motions be heard by a three-judge court, pursuant to former 28 U.S.C. § 2281. Defendants have now moved to certify that decision for an interlocutory appeal.

Upon consideration of the motion, the court finds that an immediate appeal is not likely to advance the ultimate termination of the litigation. Therefore, the motion will be denied.

IT IS THEREFORE ORDERED that the motion for certification for interlocutory appeal is DENIED.

This 20 day of August, 1985.

/s/ JAMES B. MCMILLER

James B. McMillan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS,

v.

PHILLIP J. KIRK, SECRETARY, THE DEPARTMENT OF HUMAN RESOURCES IN HIS OFFICIAL CAPACITY AND C. BARRY MCCARTY, CHAIRMAN, SOCIAL SERVICES COMMISISON, IN HIS OFFICIAL CAPACITY, DEFENDANTS

v.

MARGARET HECKLER, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES IN HER OFFICIAL CAPACITY, THIRD PARTY DEFENDANT.

DEFENDANTS' IN PART MOTION TO DISMISS PLAINTIFFS' CLAIM FOR RETROACTIVE AFDC PAYMENTS

In the event the court declares that 42 U.S.C. § 602(a)(38) supercedes its 1971 judgment, but that 42 U.S.C. § 602(a)(38) is unconstitutional, the defendants respectfully move the court to dismiss the plaintiffs' claims for retroactive payments of Aid to Families with Dependent Children from October 1, 1984, to the date of such decision, on the grounds that these claims are barred by the Eleventh Amendment to the United States Constitution.

Respectfully submitted, this the 6 day of September, 1985.

LACY H. THORNBURG
Attorney General

/s/ STEVEN MANSFIELD SHABER
Steven Mansfield Shaber
Assistant Attorney General

/s/ LEMUEL W. HINTON
Lemuel W. Hinton
Assistant Attorney General

Clifton H. Duke
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Releigh, North Carolina 27602

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD; LORETTA GILLIARD; THOMAS GILLIARD; DANA GILLIARD; GREGORY GILLIARD; REGINALD GILLIARD; AND SAMUEL DAVIS JR. GILLIARD, MINORS, BY THEIR MOTHER AND NEXT FRIEND, BEATY MAE GILLIARD, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

PHILLIP J. KIRK, SECERTARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, IN HIS OFFICIAL CAPACITY, AND C. BARRY MCCARTY, CHAIRMAN, NORTH CAROLINA SOCIAL SERVICES COMMISSION, IN HIS OFFICIAL CAPACITY, DEFENDANTS AND THIRD-PARTY PLAINTIFFS,

v.

OTIS R. BOWEN, M.D., SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THIRD-PARTY DEFENDANT.

AFFIDAVIT

BONNIE M. CRAMER, being first duly sworn, avers and says of her own knowledge:

I am the Assistant Director for Program Administration of the Social Services Division of the North Carolina Department of Human Resources and, as such, I am responsible for review and supervision of the administration of various programs of public assistance and social services, including the Aid to Families with Dependent Children (AFDC) program. My responsibilities require that I be very familiar with State and Federal statutes,

rules, regulations, and policies pertaining to the administration of the AFDC program. I am also thoroughly familiar with the decision of May 7, 1986, in the *Gilliard v. Kirk v. Bowen* case and of the requirements of that decision. Implementation of those requirements will entail the following:

A. COST OF DETERMINING RETROACTIVE ELIGIBILITY

The Division of Social Services has identified 1,761 former and present AFDC cases eligible for some form of retroactive payment because of the Standard Filing Unit ruling. (See Attachment I) In order to determine how many months of retroactive payment each case is entitled to receive, a reconstruction of eligibility will have to be made for each month the case was not on AFDC. There are over 19,000 case-months of eligibility involved.

The amount of time required to reconstruct the eligibility of a case will vary depending on a number of factors. In some instances, the task of even locating the client may be formidable. Where earned income is involved, verifying a month's income from 1984 will probably require considerable effort. Virtually all of the cases involve fluctuating amounts of child support payments, so each month will require exacting attention.

There are two classes to be considered. The first group consists of the 668 cases (38%) that were terminated but have since returned to AFDC. These clients are accessible to the agency, and the number of months that must be reconstructed is relatively small. Allowing an average of three days for the eligibility specialist to reconstruct each case, it would require 2004 man days to reconstruct eligibility for this 38 percent at a projected cost of $162,404. (The average salary and benefits received by an eligibility specialist is $10.13 per hour).

The second group consists of 1,093 cases (62%) that were terminated and have not returned to AFDC.

Counties have no indication of the current whereabouts of these individuals. The AFDC worker must first locate the family, using the resources at her disposal. These include such things as the telephone directory, city directory and court records. Location of these families will be a tremendous problem due to the transient nature of this population.

After the family is located, the worker must make contact, explain the situation and get the family to make application. The worker must then conduct one or more extensive interviews to attempt to get all information necessary to determine month by month AFDC eligibility and payment amount. The AFDC case must basically be reconstructed for each retroactive month. Much of the reconstruction must be based on the memory of the AFDC applicant. Eligibility factors such as residence, deprivation, etc., must be verified each time the family moved or experienced other changes that could affect these factors.

The vast majority of these cases has or had income simply by the nature of the situation. Income must be verified monthly. Unearned income such as Social Security and Veteran's Administration benefits could be verified by the respective agencies. Verification of other unearned income, such as contribution or direct support, would depend almost entirely on the memory of the giver. Earned income must be verified by contact with the employer or wage stubs that applicant has on hand. This will place a tremendous burden on staff in locating the employers and on the employers themselves in verifying income for the retroactive months.

Household composition, i.e., those who actually lived with the family at a particular time, must also be determined monthly from memory. Changes in household composition must then be verified using school records, collateral statements, rental records, etc.

Month by month determination of eligibility and AFDC payment amounts beginning October 1984 will be an arduous task not only for the AFDC worker but also for the applicant, employers and other sources of needed verification. The average number of months which must be reconstructed for each member of this group is 18. Because of the additional number of months involved, an average of five days must be allowed for each of these cases. The projected cost associated with this group is $442,884.

Summarizing the costs of reconstructing eligibility:

Cost of reconstruction 668 cases that were terminated but have returned to AFDC	$162,404
Cost of reconstructing 1,093 cases that have not returned to AFDC	$442,884
Total Cost	$605,288

B. EFFECT ON STATE'S ERROR RATE

Payments made retroactively to AFDC recipients under court order must be made in accordance with federal eligibility policies. The State will be held liable for any errors made under current federal error rate sanction procedures. These errors could have a devastating impact on the State's error rate. The likelihood of eligibility workers making errors when month by month eligibility has to be reconstructed for each recipient retroactive to October 1984 is high.

C. COST AND EFFECT OF ADDITIONAL PAYMENTS UNDER GILLIARD

In determing the cost of retroactive benefits to affected cases, it is assumed that those terminated and who have not returned would have been eligible were it not for the presence of the ruling. This is certainly not going to be true

for all cases – in some cases the mother will have secured employment or undergone some other change in circumstance adversely affecting eligibility. However, there is no practical way to retroactively determine over 19,000 case-months of eligibility, so for these purposes eligibility will be assumed for the entire period. Similarly, for those cases terminated that have since returned, it is assumed that they would have been otherwise eligible during their absence.

The total cost of retroactive benefits is estimated at $5,249,496. Of this amount, most of the money ($4,493,328) will go to those cases which were terminated and have not returned. This figure is large because 85 percent of the terminations occurred in 1984, and such cases will have accrued many months of retroactive benefits. The remainder of the amount ($756,168) would be paid to cases that were terminated but have since returned to AFDC.

In addition to the retroactive costs, there will be ongoing additional (non-budgeted) costs. These will occur as the 1,093 terminated cases that have not returned to AFDC are recertified and begin receiving monthly payments. The monthly amount of these payments (assuming blanket eligibility to the group) will be $238,274, or $2,859,288 annually. This amount could be lower if a case-by-case redetermination of eligibility is performed.

Although federal financial participation should be available for payments, State and county funds are not budgeted for any portion of the retroactive payments of any future payments resulting from this ruling.

The State budget for SFY 1986-87 was certified by the 1985 Session of the General Assembly. Any changes to the budget must be made during the 1986 Short Session which will be held in June 1986.

G.S. 108A-88 requires that county departments of social services be notified by February 15 of each year "of the amount of State and federal monies estimated to be available, as best can be determined, to that county for programs of public assistance, social services and related administrative costs, as well as the percentage of county participation expected to be required for the budget for the succeeding fiscal year."

Local agencies must then submit their budget request by April 30 to the county budget officer for inclusion in the county budget package and submission to the local governing board by June 1. Not earlier than 10 days after the day the budget is presented to the board and not later than July 1, the governing board shall adopt a budget ordinance for the fiscal year. Thus, most county budgets have already been approved for SFY 86-87.

Counties whose actual expenditures, excluding related administrative costs, exceed the estimates for public assistance programs only provided by the Department of Human Resources may obtain a loan from the Department for funds to pay the county share of public assistance costs that exceeds the estimates. G.S. 108A-89.

State funds are not currently budgeted to support public assistance contingency loans to counties.

The following table summaries the first-year cost of the *Gilliard* ruling.

Retroactive payments to those cases that have not returned to AFDC	$4,493,328
Retroactive payments to those cases that have since returned to AFDC	$ 756,168
Sub-total (Retroactive Payments)	$5,249,496
Ongoing payments to recertified cases	$2,859,288
Total	$8,108,784

Assuming normal rates of financial participation apply, the costs by source of funds will be as follows.

Federal Participation	$5,592,930
Local Participation	$1,257,927
State Participation	$1,257,927
Total	$8,108,784

This would mean that the State would be responsible for earmarking $8.1 until suitable arrangements could be made for federal financial participation.

Each month under federally prescribed procedures, 9% of overpaid money may be recouped on the average. Based on this rate, it is unlikely that much if any of the money paid in retroactive benefits could ever be recovered.

D. RECOUPMENT OF OVERPAYMENTS

Should the State's appeal be upheld in this matter, any AFDC benefit paid pending appeal of the May 7, 1986 judgment would be an overpayment. Federal regulations require states to take all reasonable steps necessary to promptly collect any overpayments. State policy found in the AFDC Manual at 2630, copy of which is attached hereto as Attachment II and expressly incorporated herein, outlines procedures necessary to collect overpayments.

If the overpaid AFDC family remains on AFDC, the overpayment will be recouped from the AFDC payment. The rate of collection is based on the total gross income of the family. The family, after recoupment, must be left with an amount not less than 90% of the AFDC payment received by a family of similar composition with no other income. While this is the simplest collection method for the State, it results in the families, already with quite low incomes, having their incomes reduced even further. Currently only 44% of the overpayment collections in North

Carolina are by this method. The remainder of the overpayment collections are through refunds, returned checks, etc.

While the State would be required to seek to recoup these overpayments, may factors would make this difficult. Approximately 4.5% of the AFDC caseload is terminated monthly. Estimates are that $4,493,328 of the total amount of retroactive benefits would go those terminated cases that are no longer on AFDC. Local agencies lose track of many of these families making collection virtually impossible. Failure to collect these overpayments would place a tremendous burden on the State.

To collect overpayments in cases that are no longer on AFDC:

1. Counties must collect the overpayments from any member of the originally overpaid assistance unit. For example, a grandmother begins receiving AFDC for a child who was previously a member of an overpaid assistance unit. The country [sic] must begin recouping by reducing the AFDC payment of the grandmother.
2. Counties must pursue a voluntary refund from the overpaid assistance unit.
3. As a last resort, counties are to consider court action to collect the overpayment.

Once the family is terminated from AFDC, the means of collection may be harsher by comparison (i.e., court action). If the overpayment remains uncollected, and the

family again begins receiving AFDC at any time in the future, the overpayment will be collected by grant reduction, again reducing the family's income.

/s/ BONNIE M. CRAMER
Bonnie M. Cramer

North Carolina
Wake County

Sworn to and subscribed before
me this the 15th day of May, 1986.

/s/ KATHLEEN L. LANKFORD
Notary Public
My Commission Expires 3-10-91

ATTACHMENT 1

AFDC Cases Affected by Standard Filing Unit
October, 1984 – April, 1986

Month	Cases Terminated	Monthly Benefits	Cases Reduced	Monthly Reduction
October 1984	848	$166,929	24	$2,006
November	618	121,653	10	1,236
December	45	8,852	11	1,321
January 1985	32	6,299	1	108
February	18	3,192	0	0
March	9	1,601	0	0
April	10	1,927	1	194
May	15	2,782	1	194
June	8	1,476	0	0
July	14	2,329	0	0
August	16	2,940	0	0
September	14	2,976	0	0
October	17	3,317	1	165
November	18	3,467	1	25
December	15	3,029	1	23
January 1986	16	3,606	2	377
February	15	3,232	1	52
March	12	2,460	1	25
April	21	4,338	1	52
Total	1,761	346,405	56	14,177

ATTACHMENT II

North Carolina Department of Human Resources
Division of Social Services
Assistance Payments Section
AFDC Manual AFDC-2630

Transmitted by Change No. 20-85

Financial Responsibility Rev. 1-1-85

I. Requirement

Federal regulations require the State and counties to take all reasonable steps to recover promptly any overpayment and to repay any underpayment to current recipients and those who would be current recipients if the error had not occurred. Adjustment for overpayments and underpayments must begin at the time the error first occurred.

II. Definitions

A. Overpayment – Receiving more assistance than eligible to receive.

B. Underpayment – Receiving less assistance than eligible to receive.

III. Overpayments

A. An overpayment occurs when:

1. The recipient received a payment for which he is not eligible due to an error in processing or in applying program regulations, or
2. The recipient fails to report a change in situation or provides false or incorrect information which, if reported timely, would deny, reduce, or terminate assistance, or

3. The recipient receives an assistance payment greater than the authorized payment, or
4. The recipient receives a payment while on strike the last day of the month, or
5. The recipient receives a payment due to the 10 work-day notice requirement, or
6. The recipient receives a lump sum payment, including an EIC lump sum, or
7. The recipient requests continued assistance during the hearing process, and the hearing officer afirms the reduction or termination (See AFDC-2640.), or
8. A change occurs after the processing deadline which results in a case or individual being ineligible for the following month.

B. Collection of Overpayments

Collect all overpayments according to the following regulations, unless the county board or its designee determines that an overpayment results from suspected fraud. If there is suspected fraud, follow regulations in AFDC-2631.

Take prompt action to initiate recovery of all overpayments. Prompt action is defined as within the second quarter following the quarter in which the overpayment is first identified.

You must attempt to collect all overpayments from the recipient unless the overpayment occurs because of a State or county error in processing the case or in applying program regulations.

(See III. B. 3. and 4. below.) Repayment agreements should contain only the amount of the overpayment and the repayment schedule.

1. Recipient Responsible Overpayments—Active Cases
   a. Administrative Methods of Collecting Overpayments
      (1) Voluntary Repayment
      The recipient may choose to repay the overpayment by one of the following methods:
         (a) Grant Reduction—The agency must ensure that the recipient who agrees to a voluntary reduction is not treated more harshly than the recipient who has an involuntary grant reduction. You must obtain an agreement, dated and signed by the recipient, showing the amount of the deduction, the length of time the deduction will be made and the reason for the deduction. Give the recipient a copy and maintain a copy in the record.
         (b) Recipient Refund—If the agency accepts repayment by a voluntary refund, the amount must not be less than the amount that would be collected through an involuntary grant reduction. You must obtain an agreement, dated

and signed by the recipient, showing the amount of the refund, when the refund will be made, and the reason for the refund. Give the recipient a copy and maintain a copy in the record.

(2) Involuntary Grant Reduction

If the recipient does not wish to make a voluntary repayment, either through a grant reduction or a refund, establish a monthly recovery schedule based on the recipient's grant and income/resources.

b. Source of Repayment and Repayment Limitations

(1) For both voluntary repayment and involuntary grant reduction, you may collect overpayments from all income and assets of the assistance unit, including the gross family income, liquid resources, and the assistance payment.

However, the assistance unit must be allowed to retain an amount not less than 90% of the assistance payment received by a family of similar composition with no other income.

EXAMPLE: A mother and two children have total family income of $375 ($50 AFDC plus $325 gross earned income). The recipient must be allowed to keep a minimum of $221 (90% of $246, payment standard for three persons). Therefore, the maximum amount which may be recouped in this instance is $154 per month ($375-$221).

If you calculate a repayment amount which would result in an AFDC payment of less than $10, authorize a $10 payment. Recalculate the recoupment period so the assistance unit will be eligible for $10.

EXAMPLE: You calculate an overpayment and determine the assistance unit would be eligible for an AFDC payment of $6 or a zero payment. Increase the AFDC payment to a minimum of $10.

(2) When the parent is payee only, recoup from his countable income (unless SSI) and the income and assets of the assistance unit. If the parent receives SSI, he may agree to a voluntary repayment. If so, follow the requirements above on a voluntary repayment.

When the payee is a specified relative other than a parent and not included in the assistance unit, recoup from the income and assets of the assistance unit only.

2. Recipient Responsible Overpayments When Original Case Has Been Terminated

   a. Recover the overpayment from:

      (1) Any member of the original assistance unit. Collect from the individual's income and liquid resources.

      (2) Any assistance unit of which a member of the overpaid assistance unit is now a party.

      (3) The parent payee of the overpaid assistance unit. Collect from his countable income (unless SSI). If he receives SSI, he may agree to a voluntary repayment.

   b. If a former recipient not on assistance refuses to voluntarily repay the overpayment, consider initiating civil court action against the income or resources of the individual as provided below.

      (1) Small claims court is limited to amounts of $1,500 or less. This process is designed to be used without an attorney, although one may be helpful. A booklet entitled "How to Use the Magistrate's Court to Resolve Claims" is

available at your county courthouse or through the Consumer Protection Division of the Attorney General's Office.

(2) District court handles cases of $1,501-$10,000 while superior court handles cases of over $10,000. Your county attorney can handle these cases with the investigator's assistance.

(3) The county may have the recipient sign a judgment by confession if he willingly acknowledges the debt to the State/county. Before a person is asked to sign a judgment by confession, he must be told that he is waiving his right to a trial, that he is entitled to consult a lawyer, and that he may be eligible for free legal aid. This would eliminate the need for a court trial while still giving the county a legal judgment against the recipient. Your county attorney can assist in getting the judgment finalized. See Figure 2630-1.

Factors to consider in deciding whether to initiate court action include the amount of the overpayment, the cost of court action, and the likelihood of satisfying a judgment given under the North Carolina exempt property law in G. S. 1C-1601. Under the law, each individual

can keep a certain amount of property (called exempt property) that the State or a county department of social services cannot obtain even after judgment. For assistance, consult your county attorney.

c. The recoupment of overpayments from individuals no longer receiving assistance may be waived, provided repayment is requested and:
   (1) The overpayment is less than $35.00.
   (2) The individuals responsible for the overpayment have been given at least one written notice regarding the overpayment amount, the reason for the overpayment, and their responsibility for repayment.
   (3) The written notice to the individuals responsible for the overpayment is maintained in the county case record file for three years.
   (4) Recoupment is initiated if any member of the original assistance unit again begins receiving AFDC.

d. Collect the overpayment according to regulations for active cases above if the responsible individual reapplies and is approved for assistance.

3. County Responsible Overpayments – Active Cases

   a. When the State office determines from Quality Control reported errors or

through other supervisory responsibilities that an overpayment occurred because of a county error in complying with program regulations, the overpayment will be recouped by State office adjustment.

b. If the county determines through its own review of a case that an overpayment occurred because of a county error in complying with program regulations, send a letter to the Assistance Payments Section. Give the payee's name, case identification number, overpayment period, and the amount of the overpayment by month and year. See Figure 2630-2 for a suggested format that may be used when reporting these errors. The overpayment will be recouped by State office adjustment.

c. When an overpayment occurs because of a county error in processing the check, you may recoup the overpayment from the recipient, provided the recipient was properly notified of the amount of the check he was eligible to receive. See notice requirements in AFDC-2640.

4. County Responsible Overpayments—Inactive Cases

For overpayments over $35.00:

a. When the State office determines from QC reported errors or as a result of routine supervisory review responsibilities that an overpayment occurred

because of a county error in complying with program regulations, you will be notified of the error by the Assistance Payments Section. A State office adjustment will be made at that time.

b. If the county determines through its own review of a case that an overpayment occurred because of a county error in complying with program regulations, send a letter to the Assistance Payments Section. Give the payee's name, case identification number, overpayment period, and the amount of the overpayment by month and year. See Figure 2630-2 for a suggested format that may be used when reporting these errors. A State office adjustment will be made at that time.

For overpayments $35.00 or less:

a. When the State office determines from QC reported errors or as a result of routine supervisory review responsibilities that an overpayment occurred because of a county error in complying with program regulations, you will be notified of the error by the Assistance Payments Section. No State office adjustment will be made at that time.

If any member of the original assistance unit who receives the overpayment again begins receiving AFDC, you must notify the Assistance Payments

Section in writing. Give the payee's name, current case ID, case ID of the original case, overpayment period and amounts. See Figure 2630-2 for a suggested format that may be used when reporting these errors. The overpayment will be recouped by State office adjustment.

b. If the county determines through its own review of a case that an overpayment occurred because of a county error in complying with program regulations, send a letter to the Assistance Payments Section. Give the payee's name, case identification number, overpayment period, and the amount of the overpayment by month and year. See Figure 2630-2 for a suggested format that may be used when reporting these errors. No State office adjustment will be made at that time.

If any member of the original assistance unit who receives the overpayment again begins receiving AFDC, you must notify the Assistance Payments Section in writing. Give the payee's name, current case ID, case ID of the original case, overpayment period and amounts. See Figure 2630-2 for a suggested format that may be used when reporting these errors. The overpayment will be recouped by State office adjustment.

5. State Responsible Overpayments – Active and Inactive Cases

   If an overpayment occurs because of a State office error in interpreting federal and state rules and regulations, the overpayment will be charged to the State.

   When an overpayment occurs because of a State office error in processing the check, you may recoup the overpayment from the recipient provided the recipient was properly notified of the amount of the check he was eligible to receive. See notice requirements in AFDC-2640.

6. Transfer cases

   The collection of recipient responsible overpayments remains the responsibility of the first county until the case becomes active in the second county. When the case becomes active in the second county, the collection of the overpayment becomes the second county's responsibility. The overpayment may be collected either by a refund or a grant reduction. Because the second county assumes the administrative costs for collection, it will not reimburse the first county when collections are received on transfer cases.

IV. Underpayments

A. An underpayment occurs when the recipient receives an assistance payment which is less than the amount for which he is eligible because of:

   1. Incorrect application of program regulations,

2. An error in computing the payment, or
3. An error in processing.

B. You must promptly reimburse the recipient for all county and State responsible underpayments when:
   1. The case continues to be active.
   2. The recipient reapplies for assistance and is found to be eligible.
   3. The case would have been active if the error had not occurred.
   4. The underpayments are not offset by overpayments.

V. Overpayment and Underpayment Calculations

A. Verify all changes according to the AFDC-2300 series. Use the regulations in effect when the error occurred.

B. Determine the incorrect payment period. The overpayment/underpayment period is the month when a change should have been effective until the month the change is made.

C. Determine eligibility for the overpayment period as it would have been done had the error not occurred. Compute income as instructed in AFDC-2350. If the income is enough to terminate, consider the case ineligible only for the first month of the overpayment period (or the first and/or second months if in prospective budgeting). For subsequent months, follow appropriate retrospective budgeting procedures.

Follow all regulations, including notice requirements, in AFDC-2640.

D. Always consider the child/spousal support obligation when determining the amount of recoupment for the overpayment month. This applies even when a check is returned.

For overpayments that occurred prior to January 1, 1985, you must:

1. Determine the net AFDC payment by subtracting the child/spousal support obligation from the amount of AFDC actually paid.

   EXAMPLE: $214 – AFDC actually paid
   – 50 – Child/spousal support obligation
   $164 – Net AFDC payment

2. Compare the net AFDC payment to the overpayment amount. If the overpayment amount equals or exceeds the net AFDC payment, recoup the net AFDC payment amount. Example: $170 overpayment; $164 net AFDC; recoup $164.
3. If the overpayment amount is less than the net AFDC amount, recoup the overpayment amount. Example: $50 overpayment; $164 net AFDC; recoup $50.

For overpayments that occurred on or after January 1, 1985, you must:

1. Subtract $50 from the child/spousal support obligation to determine the adjusted support obligation. If the obligation amount is less than $50, subtract the amount of the obligation.

For example: Child/spousal obligation = $75; Subtract $50; Adjusted obligation = $25.

Child/spousal obligation = $35; Subtract $35; Adjusted obligation = $0.

2. Determine the net AFDC payment by subtracting the adjusted child/spousal support obligation from the amount of AFDC actually paid.

   EXAMPLE: $214 – AFDC actually paid
   – 50 – Adjusted child/spousal support obligation
   $164 – Net AFDC payment

3. Compare the net AFDC payment to the overpayment amount. If the overpayment amount equals or exceeds the net AFDC payment, recoup the net AFDC payment amount. Example: $170 overpayment; $164 net AFDC; recoup $164.

4. If the overpayment amount is less than the net AFDC amount, recoup the overpayment amount. Example: $50 overpayment; $164 net AFDC; recoup $50.

E. Compare the overpayment and the underpayment when they both occur during the same period and are both recipient responsible. If the overpayment exceeds the underpayment, subtract the underpayment from the overpayment to determine the net overpayment to collect. If the

underpayment exceeds the overpayment, no action is necessary. Do not reimburse recipients for recipient responsible errors.

If an overpayment and underpayment occur during the same period and are both county responsible, you must reimburse the recipient for the underpayment and the overpayment will be recouped by State office adjustment.

If an overpayment and underpayment occur during the same period and are not both county or both recipient responsible, a net overpayment or underpayment cannot be determined. In these situations, the recipient must be reimbursed for all county responsible underpayments. Overpayments that are recipient responsible must be collected from the recipient. Overpayments that are county responsible will be recouped by State office adjustment.

F. Take appropriate action to collect any overpayments.

G. Request an adjusted payment to correct an underpayment according to the procedures in the EIS User's Manual.

Do not count the adjusted payment as income or as a resource in the month paid or in the following month.

VI. QC Reported Error Cases

A. The Quality Assurance Section will forward findings of error to the county departments. Upon receipt, take the following actions:

1. Review findings of error.

2. Contact the Quality Assurance Section of the State office within ten workdays if there is disagreement with the findings. (See Figure 2630-3.) If there is no disagreement, the error stands as reported and is forwarded to the Assistance Payments Section for financial review.

B. The Assistance Payments Section will request that the county department provide within 15 days the amount and duration of the error as well as the county's corrective action. (See Figure 2630-4.)

VIII. Financial Review Procedures

A. For QC and other reported error cases, the Assistance Payments Section will:

1. Review the information provided by the county department.
2. Notify the county department of financial review findings.
3. Notify the Federal Grants and Reporting Section of adjustment required for State and county responsible overpayments.

B. Responsibilities of the County Department

1. Take action to recoup the recipient responsible overpayment, or
2. Make an adjusted payment to the recipient.
3. Notify the Federal Grants and Reporting Section of action to collect the recipient responsible overpayment.

C. County Procedures for Reconsideration and Appeal

1. If you do not agree with the findings of financial responsibility, you may request a reconsideration. If so, submit additional information along with your request to the Assistant Payments Section.
2. If you do not agree with the decision on the reconsideration, you may appeal. Appeal procedures are outlined in County Letter A-2-82.

Figure 2630-1

SAMPLE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

NORTH CAROLINA

_____ COUNTY,

_____ COUNTY, PLAINTIFF

v.

_____, DEFENDANT

JUDGMENT BY CONFESSION

THE UNDERSIGNED DEFENDANT, a resident of _____ County, DOES HEREBY CONFESS JUDGMENT in favor of _____ County in the sum of _____ dollars ($) and DOES HEREBY AUTHORIZE the Clerk of Superior Court to enter judgment against me therefore.

I further acknowledge and confess that I have received Public Assistance payments in the total amount stated above, to which I was not entitled. I further acknowledge and confess that I have signed, freely and without coercion, a Promissory Note to insure repayment of the above stated sum in the manner indicated in said Note and authorize _____ County to file this judgment against me at such time as I should fail or refuse or otherwise default in the repayment of this sum as agreed.

_____
Signature of Defendant

The undersigned recipient, the Defendant herein, being first duly sworn, depose and say: that I have read the

foregoing Judgment by Confession and that the matters and things contained therein are true of my own knowledge. I also affirm that I understand that by signing this Confession I waive my right to a Civil Court trial.

_____

Sworn to and subscribed before me
this the ____ day of _____, 19 ____.

_____
NOTARY PUBLIC

My Commission Expires: _____

Figure 2630-2

COUNTY REPORTED OVERPAYMENT

_____ County Department of Social Services

Payee Name: _____

Case I.D. #: _____

County Case #: _____

Reason: _____

_____

_____

Total Overpayment: _____

Month/Year	*Amount*
_____	_____
_____	_____
_____	_____
_____	_____

This information is being submitted in accordance with AFDC Manual Section 2630 for State Office adjustment.

_____ _____

(County Director's Signature) (Date)

Submit To:
Assistance Payments Section
Division of Social Services
325 N. Salisbury Street
Raleigh, North Carolina 27611

Figure 2630-3

DSS-1285 (Rev. 4/81)
Quality Assurance

MEMORANDUM Date Mailed _____

TO: _____, Director
_____ County Department of Social Services

FROM: Zelda C. Epley, Chief, Quality Assurance

RE: Case Name _____ Program _____
County Case No. _____ Account No. ____
QC Review No. _____ County No. ____

An error in payment has been found in the above-mentioned case by Quality Control. Please review and list facts in the space below to indicate any disagreement.

_____ _____
DATE NAME OF WORKER

NOTE: If this is not received by the Quality Assurance office by ___/___/___ (10 work days from date mailed), the QC findings will stand.

Mail original and 1 copy to:
Quality Assurance Section
Division of Social Services
325 North Salisbury Street
Raleigh, North Carolina 28611

Retain 1 copy for eligibility file.

Figure 2630-4

DSS-2969 (Rev. 7/82)
Assistance Payments Section
Date Mailed _____

FINANCIAL REVIEW

Memorandum

To: _____, Director
_____ County Department of Social Services

From: Kay C. Fields, Chief, Assistance Payments Section

RE: Information required for financial review of QC cases

We have been advised that an error has been determined by QC in the following AFDC case. In order for us to complete our financial review, we will need a statement regarding the amount and duration of the incorrect payment, and your corrective action. Please enter this information in the space indicated below.

A. Case Identification

Case Number _____Account No. _____
QC Review No. _____QC Review Date _____

B. Incorrect Payment Amount and Duration

C. County Corrective Action

Name of Worker	Date Completed

NOTE: Please complete this form by __/__/__ and return it to the following address:

Assistance Payments Section
Division of Social Services
325 North Salisbury Street
Raleigh, North Carolina 28611

FINANCIAL REVIEW

NORTH CAROLINA)
) **AFFIDAVIT**
WAKE COUNTY)

I, Dianne Jefferys, duly sworn, do depose and say:

1. I live at 157 Mangum Drive in Wendell, North Carolina.

2. I have four children: Latoya T. Jefferys, age 8; Anettress T. Jefferys, age 5; Shanta M. Jefferys, age 4; Anthony T. Jefferys, age 2.

3. I am 25 years old. I do not have a job and have no independent income of any kind.

4. I am married to Michael Jefferys, although we have been separated for many years. He is the father of Latoya and Anthony. As a result of a court order in the Wake County case 79 CVD 2360, he is required to pay $51 a week in support.

5. Johnny Michael Shannon is the father of Shanta and Anettress. No paternity determination has been made by a court regarding Mr. Shannon, nor has he been ordered to pay support.

6. Prior to October, 1984, I received AFDC for myself and Anettress and Shanta in the amount of $223 a month. I received child support from Michael Jefferys of $204 per month. The total was $427.

7. After October, 1984, I was required to add Latoya and Anthony to the AFDC grant. Neither I nor the children's father wanted them added to the welfare unit, but I had no real choice because I had to have some income to support Shanta and Anettress.

8. In November, 1984, my AFDC grant increased to $267 per month. I also received a $50 check each month as the child support disregard.

9. I have not received a $50 disregard check since May, 1985. I later found out this was because Michael Jefferys stopped paying support. I don't know why he stopped pay-

ing support, but he has told me that he feels like when he pays, his children do not really benefit. He feels like he is supporting all my kids when he pays support.

10. My AFDC check is now my only income. It has gone up to $294 because of the ten percent increase that went into effect July 1, 1985.

11. After my income dropped, I experienced extreme financial difficulties. I could barely afford the rent of $200 per month for my house on my income of $427 per month. After the new rule went into effect and my income went down I got behind on my rent and was evicted in June. I could not find a place to live that I could afford on my lower income. I had to move in with my cousin, who already had a household of four. Due to her kindness my family has been able to stay there, but we really need a place of our own. I got behind on most of my other bills and have had a terrible struggle trying to keep the bunk beds I bought for my children. I cannot buy any clothes or shoes for the children, and have been getting used clothing from charitable organizations. I have had to miss several doctor's appointments because I have not had money to pay for transportation.

/s/ DIANE JEFFERYS
Diane Jefferys

SWORN TO and subscribed before me
this 13th day of September, 1985

/s/ GERALDINE B. SANDERS
Notary Public

My Commission Expires: August 20, 1985

NORTH CAROLINA)
) **SUPPLEMENTAL AFFIDAVIT**
DURHAM COUNTY)

I, Arvis Waters, Being Duly Sworn, Do Depose and Say:

1. Since the time the Standard Filing Unit went into effect, my family and I have been off and on AFDC several times. I am not currently receiving AFDC benefits, but have reapplied.

2. My understanding is that the father of my two youngest children regularly pays $45 a week into the Clerk of Court in Bronx, New York. This money is not transmitted to me or the Clerk of Court in Durham County, North Carolina on a regular basis. The Clerk in New York has informed me that the office there is too backlogged to send the money as it is paid in.

3. I moved to North Carolina from New York in May, 1984. The last child support, I received in New York was in April, 1984. I worked from May through August and did not receive any AFDC benefits during that time. Because of the backlog in New York, however, I did not receive any of the child support paid for those months.

4. When I returned to school in September, 1984, I began to receive AFDC benefits. I received AFDC from September through December 1984.

5. In November, 1984, accumulated child support of $495 was sent to me. This caused my AFDC check to be terminated effective December 1, 1984, despite the fact that this amount represented child support during the months I worked and was not receiving AFDC. I had no income for December, January and a portion of February.

6. I was permitted to reapply for AFDC in February, and was reinstated, at the rate of $288 a month, in March. I also received a pro rated check for part of February.

7. I continued to receive $288 per month in AFDC benefits through July.

8. In May, another accumulated child support check, for $585, was sent to me from New York. I reported this to the Department of Social Services and was informed that it would cause my AFDC to again be terminated. For reasons I do not understand, the AFDC check was not terminated, and I received $288 in AFDC through July.

9. In August, my AFDC check was in the amount of $195. I was informed by my worker that my benefits were being reduced to recoup the benefits I received after receiving the May child support check. I have not been informed how much the department intends to recoup.

10. Also in August, I checked with the Durham Clerk of Court's office and learned that $810 in child support had been sent from New York in July. This money was sent to the North Carolina Department of Human Resources. I immediately went to talk with my worker at Durham D.S.S. to learn how that money would be distributed. My worker told me that if I returned the August AFDC check, I could receive all but $288 of the $810 support check. The $288 would reimburse the state for the AFDC paid in July, the month the support was received.

11. I returned my August AFDC check and voluntarily terminated my AFDC case, based on the information obtained from Durham, D.S.S. At the end of August I received a check for $50, representing the disregard for the July support received.

12. I returned to D.S.S. to try to learn why I had only received $50. At that time my worker said he had been mistaken and that all the remainder of the $810 in child support would be retained by the state. I tried to get my August check back, but that request was denied. I reapplied for AFDC, but have not yet been certified or received any money.

13. Other than the one $50 payment I received in August, I have not received any child support disregard checks.

14. As a result of being without income, I have absolutely no money. I have run out of just about everything that cannot be purchased with Food Stamps, such as soap, toothpaste, toilet paper, etc. My rent has not been paid for September. When my son had an asthma attack, I did not have enough cash to pay a cab to get him to the health clinic. Both Aaron and Bernard are pigeon toed and need to wear hard shoes, but I cannot by [sic] them. None of the children have had any new clothes or shoes for several months. It is only through the kindness of a friend that I even have diapers for the baby. I am extremely frustrated and do not understand why my children cannot get the child support being paid for them.

This the 13th day of September, 1985.

/s/ ARVIS WATERS
Arvis Waters

SWORN TO and subscribed before me
this 13th day of September, 1985

/s/ PAUL BALDASAU, JR.
Notary Public

My Commission Expires: 11/22/86

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS,

v.

PHILLIP J. KIRK, SECRETARY, THE DEPARTMENT OF HUMAN RESOURCES IN HIS OFFICIAL CAPACITY AND C. BARRY MCCARTY, CHAIRMAN, SOCIAL SERVICES COMMISSION, IN HIS OFFICIAL CAPACITY, DEFENDANTS

DECLARATION OF CAROL B. STACK

I, Carol Stack, hereby declare under penalty of perjury that the following facts are true and correct:

1. I am an Associate Professor of Public Policy Studies and the Director of the Center for the Study of the Family and the State at Duke University.

2. I have a Ph.D. degree in anthropology, and have conducted numerous research projects and scholarly investigations on the subject of kinship structures in black and poor families, and particularly on the impact of welfare policy on those structures. A copy of my resume, which lists the articles and books I have written on these topics, is attached to this declaration as Exhibit A, and incorporated by reference herein.

3. I am generally familiar with the federal and state laws, regulations, and policies governing the AFDC program in (North Carolina). I am familiar with the state's laws and policies regarding the obligation of absent parents to pay child support. I am also familiar with the programs and service provided by the Child Support En-

forcement Agency ("IV-D") in North Carolina, to assist custodial parents and the state to collect child support payments from absent parents.

5. Prior to preparing this declaration, I reviewed the plantiffs' Motion for Further Relief in this litigation, and all attachments thereto, including the affadavits [sic] by movants Thomas, Medlin, Miles, and Waters. I have also reviewed the statutes and regulations which create the "standard filing unit," including 42 U.S.C. § 602(a)(38) and AFDC Manual Section—2360.

6. I have also reviewed the affidavits of Kay Fields and Jo Anne B. Ross, filed by defendants, as well as the depositions of Dan Miles, Kay Fields, and the movants.

7. Based on my review of these documents, and my expertise about the kinship structure and cultural norms of poor and black families and about welfare policy, I am able to make the following statements.

8. The literature on the impact of divorce on children shows that children who fare best are those who experience the continued interest and support, both financial and emotional, of both parents.

9. In poor families, the continued interest and support of the father is of particular importance to the child because the father, when he acknowledges and supports his child, brings to the child the support of his entire extended kin network. It is fairly widely recognized in the scholarly literature (Hill 1975, Stack 1974) that in low-income communities, and expecially in low-income rural and urban black communities, mothers come to depend upon extended kin networks very heavily. In fact, extended kin ties create a community of concern for single mothers that forms the basis for emotional and physical survival.

For mothers living near or under the poverty level, adult kin, a child's aunts, uncles, and grandparents, provide goods and services, child care, help in time of crisis. An in-

heritance of sorts is given to the child by this kin network, in the form of acts of mutual responsibility. Raising children on a limited budget puts abnormal stress on mothers. While they are able to negotiate typical days and weeks—if any are "typical"—they need help in times of crisis. Many mothers could not financially or emotionally handle the plethora of parenting crises—sick children, evictions, fires, the strains of inadequate housing, transportation, and medical care—without the steady, predictable, and reliable resource of their kin networks.

10. It is well documented that the family support system for young children in poor communities is drawn from a child's relatives through both their parents and in black communities this is generally the case even if the parents were never married. This has been shown in my own ethnographic research, in a book titled ALL OUR KIN (Stack 1974), in the work of Dr. Robert Hill, THE STRENGTHS OF BLACK FAMILIES (1972) and INFORMAL ADOPTION IN BLACK FAMILIES (1977), and in a recent study by Ronald Haskins and Andrew Doblestein (1985) on the impact of Child Support Enforcement (IV-D) on the role of fathers in the lives of their children. These studies show that the paternal kin are often as anxious as mother's kin to share in the rewards and responsibilities of a new child.

11. It is not easy under the best of circumstances for mothers in low income families to create and sustain the interest, concern, and responsibility of fathers and paternal kin toward their children. To maintain this support, mothers must respond to a complicated system of cultural rewards, to allow father and paternal kin access to their children. The father must be permitted to feel that they have some control and responsibility over the child's upbringing and future possibilities. Mothers sustain such relationships with fathers in order to avoid the detrimental consequence to the child that would result if network ties with the father and his kin were placed in jeopardy.

12. When it is possible for a father, married or single, to provide enough child support to keep his child off the welfare rolls, this act of responsibility and integrity brings status to the father, especially in communities in which a future of chronic unemployment is a real risk for many children. This is not to imply that being on welfare necessarily entails a stigmatized status, for it is a necessity for the majority of black mothers. Rather, there are incentives within the structure of black communities, as well as in the public sector, that encourage fathers to keep their children off the welfare rolls. A father gains great self esteem and status in low income communities if he can give his child the chance for a life of gainful employment rather than welfare dependency.

13. In communities whose families live in poverty, fathers who are able to support their children are considered to have a depth of character and integrity that defies unfair myths and stereotypes about fathers in general, and black fathers in particular. A law that tells fathers that their efforts cannot keep their children off the welfare rools, or that what they can provide is not good enough, challenges the efforts and integrity of good men and fathers. Feelings of anger, frustration and shame are not inappropriate or unexpected. The anger is sometimes vented at children, sometimes at mothers, more often at both.

14. Fathers may express this anger and frustration in many forms. Some fathers, who live with or near their own relatives, may attempt to poison their own kin's feelings about a mother who cooperates in placing the father's child on the welfare rolls. The father and his kin may cease to visit the child and withdraw network support. In other instances, fathers will refuse to make support payments to the state, even though they were reliable in providing child support payments to keep their children off the welfare rolls. The actions of John Pennington, the father of

movant Dianne Thomas's child Sherrod, show such a reaction by a father who has found out that the standard filing unit regulation will put his child on the welfare rolls in spite of his regular payment of child support. (See Affidavit of Dianne Thomas, paragraphs 8, 11.)

15. The anger and frustration that fathers feel and express when their children are forced on welfare will endanger the child's relationship with the father's kin network. When the kin network is endangered, it is the child that suffers first. When the mother's access to the resources of the father and his kin is jeopardized, the mother is place under great emotional and physical stress, and the child, in consequence, whose development is already at risk, is placed in an even more vulnerable position.

A study of child abuse by Michael Wald, Professor of Law at the Stanford University Law School, demonstrates that mothers and children are more vulnerable when there is a lapse in the viability of the family network. When mutual aid is provided by the kin network, children are less at risk; when the mother becomes unable to rely on the network, that is when the incidence of child abuse, neglect, and other problems increases.

This declaration is submitted pursuant to 28 U.S.C. § 1746.

Date: September 13, 1985

/s/ CAROL B. STACK

Carol B. Stack

EXHIBIT A

November, 1984

Carol B. Stack

Home Address

Route 1, Box 201-H
Durham, N.C. 27705
(919) 967-2917

Business Address

Institute of Policy
Sciences
Duke University
4875 Duke Station
Durham, N.C. 27706
(919) 684-2871

Current Position

Director, Center for the Study of the Family and the State, Associate Professor of Public Policy Studies, Institute of Policy Sciences and Public Affairs, Adjunct Associate Professor, Anthropology, Duke University

Education

Undergraduate—B.A., Philosophy
University of California, Berkeley, 1961

Graduate—Ph.D., Anthropology
University of Illinois, Urbana, 1972

Research Interests

The Social Anthropology of Urban Anthropology; Social Welfare and Family Policy; Black Migration in the U.S.; Culture, Life Cycle, and Gender Inequality

Employment

1975 to present
Associate Professor of Public Policy Studies and Anthropology
Institute of Policy Sciences and Public Affairs
Duke University

Employment (cont.)

1974-1975
Visiting Professor, Department of Anthropology
University of California, Berkeley

1972-1974
Assistant Professor, Department of Anthropology and Center for Applied Anthropology
Boston University

1971-1972
Assistant Professor of Child Development and Anthropology
University of Illinois, Urbana

1962-1964
Social Studies Teacher
Berkeley High School

Grants, Fellowships

Nominated to be a Fellow at the Center for Advanced Study in the Behavioral Sciences at Stanford, 1987

Rockefeller Foundation Humanities Fellowship, 1984

Duke University Research Council, Major Grant, 1983

National Organization of Professional and Business Women, Scholar of the Year Research Award, 1982

Duke-UNC Women's Studies Research Center, Faculty Award, 1982

National Science Foundation—Society for Applied Anthropology Travel Grant to Edinburgh, Scotland, April, 1981

Mary Reynolds Babcock Research Grant to the Center, "Employment and Families in Mecklenburg County, N.C.," 1980

Z. Smith Reynolds Foundation Grant to the Center, "Children and The Law in North Carolina," 1980

Grants, Fellowships (Cont.)

North Carolina Humanities Committee Conference Grant, "The Family and the State: Scarce Resources, Shared Responsibilities, Duke University, May 12-13, 1978

Principal Investigator, National Institute of Mental Health Post-Doctoral Training Program in National Policy and the Family, 1977-1980

Summer Fellowship, National Endowment of the Humanities, 1976

National Institute of Mental Health Dissertation Research Grant, 1969-1971

National Institute of Mental Health, Predoctoral Research Fellow, 1966-1970

National Committees and Boards

President, National Society for Urban Anthropologists, 1984-1985

Signs, Editorial Board, 1985

Advisory Board, National Child Welfare Leadership Center

Advisory Board, Wenner-Gren Foundation for Anthropological Research, New York, 1980-1984

Advisory Board, Family Impact Seminar, Institute for Educational Leadership, Washington, D.C., 1978-1983

Senior Fellow, Center for the Study of Aging and Human Development, Duke University Medical Center

National Advisory Committee on Research, White House Conference on Families

American Society for the Advancement of Science Congressional Fellowship Selection Committee

National Committees and Boards (Cont.)

National Academy of Sciences, Panel for the Study of the Policy Formation Process

Books

All Our Kin: Strategies For Survival in a Black Community, New York, Harper and Row, 1974

Holding On To The Land and The Lord: Essays on Kinship, Ritual, Land Tenure, and Social Policy, edited by Robert L. Hall and Carol B. Stack, Georgia, University of Georgia Press, 1982

Hope and Circumstance: The Homeward Bound Migration of Black Families to the American South, New York, Pantheon Press, in preparation

The Rites of Children: Culture, Ideology, and Social Policy, New York, Pantheon Press, in preparation

Articles

"The Kindred of Viola Jackson: Residence and Family Organization of An Urban Black American Family," in *Afro-American Anthropology: Contemporary Perspectives,* N. Whitten, Jr., and J. Szwed, eds., The Free Press, New York, 1970

reprinted in *Cultural and Social Anthropology,* Selected Readings, B. Hammond, ed., MacMillan, 1973

reprinted in *City Ways: Reader in Urban Anthropology,* P. Gmelch and W. Zenner, eds., St., Martin's Press, 1975

"Black Kindreds: Parenthood and Personal Kindreds Among Blacks Supported by Welfare," Journal of Comparative Family Studies, Fall, 1972

"The Concept of Family in the Poor Black Community," by C. Stack and H. Semmel, *The Family, Poverty, and Welfare Program: Factors Influencing Family*

Articles (Cont.)

Instability, Studies in Public Welfare, Paper No. 12 (Part II), Government Printing Office, No. 5270-02040

"Sex Roles and Survival Strategies in an Urban Black Community," in *Women, Culture, and Society,* L. Lamphere and M. Rosaldo, eds., Stanford University Press, 1974

reprinted in *Social Interaction: Introductory Readings in Sociology,* H. Robboy, S. Greenblatt, and C. Clark, eds., St. Martin's Press, 1979

reprinted in *Sex and the Gender Reader,* L. Richardson and V. Taylor, eds., D.C. Heath, 1981

reprinted in *The Black Woman Cross-Culturally,* F.C. Steady, ed., Schenkman, 1981

"Who Raises Black Children," in *World Anthropology,* T. Williams, ed., Mouton Publishers, 1975 (reprinted from *All Our Kin*)

"Social Insecurity: Breaking Up Poor Families," in *Welfare in America: Controlling the Dangerous Classes,* Betty Reid Mandell, ed., Stanford University Press, 1974

"Economically Cooperating Units in an Urban Black Community," C. Stack and J. Lombardi, in *Anthropology and the Public Interest,* P. Sanday, ed., Academic Press, 1976

reprinted in *Issues in Black Mental Health,* Southern Regional Educational Board, Spring, 1978

"Who Owns the Child? Divorce and Child Custody Decisions in Middle-Class Families," in Social Problems, Vol. 23, No.4, April, 1976

Articles (Cont.)

"Income Support Policies and the Family," C. Stack and C. Blaydon, in Daedalus, Special Issue on the Family, April, 1977

"Organizing Kinfolk," by C. Stack and L. Holt, Anthropology Resource Center Newsletter 3:2, June, 1979

"Age, Ethnicity, and The American Family," by C. Stack and J. Weatherford, in *Family and Older Persons: Policy, Research, and Practice,* Maddox, Seigler, and Blazer, eds., published by the Duke Center for the Study of Aging and Human Development, 1980

"Children's Rites: Professional Wisdom, Cultural Realities," in Martha Cox and Roger Cox, eds., *Foster Care: Current Issues and Practice,* Ablex Press, 1984

"Cultural Perspectives on Child Welfare," in *Review of Law and Social Change,* Spring, 1984

"Experiments with Truth," in *Measuring The Impact of Interventions,* edited by Robert Morone, University of Arizona Press, 1985

"Who Counts: Black Home Place Migration To North Carolina, 1975-1980," *The Professional Geographer,* Fall, 1985.

"Three Domestics," by John Marshall, reviewed in the American Anthropologist, Vol.75, No.2, Page 590, April, 1973

Papers Presented at Professional Meetings

"Who Counts: Black Home Place Migration," Southeastern Geography Association, October, 1984

"Family, Gender and Sexual Movements in Contemporary Society," Discussant, American Anthropological Association, Chicago, November, 1983

Articles (Cont.)

"Urban-Rural Migration to the American South," Society for Applied Anthropology, San Diego, California, March 11, 1983

"Anthropological Training Programs in Family Policy," Society for Applied Anthropology, Edinburgh, Scotland, April 12, 1981

"Anthropology and Public Policy," Organizer, Plenary Session (with Jan Brukman, Wenner Gren Foundation), American Anthropological Association, Washington, D.C., December, 1980

"The Rural South: Problems and Prospects," Organizer, Key Symposium, Southern Anthropological Association, March, 1980

"Divorce and Child Custody in the U.S.," Symposium on Children and Families, American Anthropological Association, 1976

"Politics and Public Policy in Complex Society," American Anthropological Association, 1976

"Network Support Systems in Urban Black Families," American Association for the Advancement of Science, 1975

"Social Mobility in Complex Society," American Anthropological Association, 1974

"Black and Female", The Second Berkshire Conference on the History of Women, 1974

"Child-Givers and Child-Receivers," International Congress of Anthropological and Ethnological Sciences, 1973

Invited Talks

"Hope and Circumstance: Black Migration in the U.S." The Miller Lectur[sic]ship, University of Illinois, Urbana, October, 1984

Invited Talks (Cont.)

"Experiments with Truth," Arizona State University School of Social Work, Conference on "Measuring the Impact of Interventions." May 15, 1984.

"The Future of the South," Presented to the *Standing Committee on the Future of the South.* June, 1984.

"Child Welfare and Social Justice," Smith School for Social Work Visiting Lecture, Smith College, Northampton, Mass., July, 1983

"Psychological Parenting Theory and Child Welfare," Rutgers University School of Law, April 30, 1983

"Homeward Bound: Black Women and Migration in the 1980's," Cornell University, April 26, 1983

"Women and The New Class War," Anna Howard Shaw Lecture, Bryn Mawr College, March 31, 1983

"A Dual System of Children's Rights," Grand Rounds, Psychiatry, Duke University Medical Center, October, 1981

"Values in Conflict: Finding Common Ground," Keynote Address, Family Service Association of America, Biennial Conference, San Antonio, Texas, August, 1981

"Homeward Bound: Reverse Migration in the 1980's," Blue Ridge Institute for Southern Community Service Executives, Black Mountain, North Carolina, July, 1981

"Foster Care and Permanency Planning," North Carolina Coalition for Foster Children, Annual Meeting, February, 1981

"The Black Undercount," U.S. Brueau of the Census, Washington, D.C., December, 1980

"Government Policies and Family Values," North Carolina Humanities Committee and Family Services

Invited Talks (Cont.)

of Greater Greensboro, Conference on The Family in Contemporary Society, December, 1980

"Parents as Educators: Anthropological Perspectives," National Institute of Education, July, 1980

"Family Networks and Public Policies," Research Triangle Institute, April, 1980

"Single Parents," Durham County Hospital, March, 1980

"Child Policy: Ethical Issues," Conference on Governing the Youth, University of Maryland, February, 1980

"Family Policy: In Whose Best Interests?" International Year of the Child Symposium, Center for International Studies, Duke University, December, 1979

"All Our Families," Invited Lecture, Center for the Study of Aging and Human Development, Duke University, December, 1979

"Changing Family Patterns and Rural Policies," James Sprunt Institute, Keansville, N.C., October, 1979

"Health Policy for American Families," School of Public Health, University of North Carolina, Chapel Hill, September, 1979

"Families or Planner, Whose Values Set Policies?," Appalachian Regional Commission Conference, Raising a New Generation, 1979

"The Future of the Family," Convocation Address at Eastern Carolina University, 1979

"At Risk Families," Keynote Speech, Blue Ridge Institute, 1979

Invited Talks (Cont.)

"The Corporation and the Family," Aspen Institute for Humanistic Studies, Aspen, Colorado, 1978

"Child Abuse: Cross Cultural Perspectives," Primary Care Seminar, Boston University Medical Center, 1979

"Minority Families and Public Policies," Groves Conference on Marriage and Family, Washington, D.C., 1978

"A Legislative Agenda for Children," Governor's Advocacy Council on Cstblnae iel PrqhsW SibatxsW Irnhs AinrbteiW 2-89

"Defining the Family for the 21th Century," American Association for the Advancement of Science, 1978

"Social Insecurity: Breaking up Poor Families," President's Commission on Mental Health, Washington, D.C., 1977

"The Rights of Children: Moral and Legal Perspectives," Keynote address, North Carolina Home Economics Association, Raleigh, North Carolina, 1977

"Child Care Needs of Working Parents," Salem College Lifespan Center and the Council on the Status of Women, Winston Salem, North Carolina, 1977

"The Family in the 20th Century," North Carolina Family Life Council, 1977

"The Black Family in Slavery and Freedom: Implications for Research," Temple University, 1977

"The Impact of the Parent Locator Bill," Keynote Address at the Annual Meeting of the Greater Massachusetts Chapter of the National Association of Social Workers, Boston, Massachusetts, 1976

"The Future of the Family," A Bicentennial Lecture, Williams College, Maryland, 1976

Invited Talks (Cont.)

"Comparative Family Support Systems in the United States," Brandeis University, 1975

"Urban Ethnics," Department of Anthropology, Brown University, 1975

"The Urban Poor: Economically Cooperating Units in a Complex Society," Department of Anthropology, University of California, Berkeley, 1974

"New Paradigms for Urban Research," Department of Anthropology, University of North Carolina, Chapel Hill, 1974

"The Culture of Poverty Reconsidered," Massachusetts Institute of Technology, 1975

"Class, Ethnicity and Urban Kinship," Colgate College, 1974

"Black Kindreds," Department of Anthropology, Brandeis University, 1973

"Residence Patterns and Urban Housing," Department of Urban Studies, Massachusetts Institute of Technology, 1972

Duke University Committees

Academic Council, Ad Hoc Committee on Sexual Harassment, 1983

Institute of Policy Sciences, Search Committee, 1982-83

Department of Anthropology, Undergraduate Curriculum Committee, 1982-83

Academic Council, elected member, 1981-1982

Dean's Committee on Dance, 1981-1982

Advisory Board, Duke Council on Aging and Human Development, 1980-1982

Duke University Committees (Cont.)

Undergraduate Curriculum Committee, Department of Anthropology, 1980-1982

Committee on Courses of Instruction, Arts, and Sciences, Trinity College, 1979-1981

Selection Committee, Duke Endowment Awards for Excellence in Teaching, 1979

Task Force on Student Health, 1978

Faculty Fellow, Few Federation, 1977

Black Studies Committee, 1976-1978

Undergraduate Faculty Council of Arts and Sciences, 1976-1978

North Carolina Public Service

Durham Commission on Teenage Pregnancy, 1984-1985

Juvenile Justice Research Advisory Committe, Child Advocacy Commission of Durham, 1981-1982

Member, North Carolina Chapter of the National Black Child Development Institute

Member, Governor's Task Force on Creating An Age Integrated Society

Head, Governor's Task Force on the Family, 1976

Advisory Board, North Carolina Land Trustees, Inc.

Courses Taught

Public Policy Courses

Women and Justice
Street Level Bureaucrats
Child and Family Policy: Comparative Perspectives
The Culture of Inequality
Migration and Public Policy
Anthropological Perspectives on Social Policies

Courses Taught (Cont.)

Anthropology Courses

Introduction to Cultural Anthropology
Urban Anthropology
Contemporary American Ethnography
Race and Caste in America
Anthropology and the Public Interest
Anthropology of the American South
Life Cycle: Comparative Perspectives
Qualitative Research Methods
The Afro-American Experience
Transactions in Parenthood
Anthropology and the Life Cycle
Kinship

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, ET AL., PLAINTIFFS

v.

PHILLIP J. KIRK, ET AL., DEFENDANTS.

AFFIDAVIT OF PATRICIA HUNT

I, Judge Patricia S. Hunt, after being duly sworn depose and say:

1. I am a District Court Judge in Judicial District 15B in the State of North Carolina.

2. Prior to becoming a District Court Judge in October, 1981, I practiced law and served as a Representative in the North Carolina House of Representatives from 1972 to 1981.

3. As a member of the House of Representatives, I served on the Social Services and Health committees which studied child support in the State of North Carolina and the delivery of public assistance in the State of North Carolina.

4. As a District Court Judge holding court in Orange and Chatham counties over the last four years, I have listened to and decided at least 400 child support, child custody and juvenile court cases per year.

5. As a District Court Judge and as a member of the House of Representatives I have become knowledgeable about the child support enforcement statutes and judicial practice regarding child support in the State of North Carolina.

6. Under North Carolina statutory and case law, a District Court Judge is required to order the payment of child support based solely on the needs of the child and the needs and ability of the noncustodial parent to contribute to the support of the child.

7. When setting the amount a noncustodial parent is required to pay for the support of a child, a District Court Judge is not permitted to consider the needs of other children who may live in the household, who are not the children of the noncustodial parent.

8. Under North Carolina Law, a District Court Judge cannot order a man to pay child support unless there has been a determination of his paternity of the child and therefore, a conclusion that he has a legal responsibility for support.

9. When ordering the payment of child support, a District Court Judge specifically names the parent who is to pay the support and the child for whom the support is designated. It is a violation of a court order for a custodial parent to spend the child support on other children not designated in the child support order.

10. Under North Carolina law, parents have a legal obligation to support their children. If a custodial parent refuses to provide for the needs of his child, the child may be removed from his custody by court order and placed in the custody of the Department of Social Services.

11. As a District Court Judge, I have heard hundreds of cases in which parents, particularly fathers, have not been paying child support. Consequently, I view one of my most important duties as a District Court Judge to be the encouragement of parents to accept the financial and emotional responsibility they have placed on themselves by having children. One of my greatest tools for instilling this responsibility has been a lecture to the parents about the importance of supporting a child and thereby removing that child from the public assistance rolls. I

usually give the parents thirty (30) days to go out to find a job. I have observed the pride of accomplishment with which fathers have responded when they return to court to announce that they have obtained employment and their child will no longer be on "welfare."

12. Conversely, I have also observed the outrage a father has expressed when I have had to explain to him that even though he is providing support for his child, his child must be placed on the AFDC roles so that the other children in the household can get AFDC. One father exploded in the courtroom yelling "I won't have my child on welfare! I support him. And I'm not going to support anyone else's children!" I fully expect to continue hearing father's refusal to pay child support when they learn that their child support is being paid to the Department of Human Resources instead of to their children, and when they discover that their child is on welfare even though they are paying child support regularly.

13. If a father refuses to pay support, I have very few legal tools to utilize to force him to pay child support.

a. I can threaten a father with a jail term, or actually order him to jail, but a father does not pay child support while he is in jail, so that a jail term rarely results in income for the family.

b. I have the power to garnish wages, but I have found that fathers who fail to accept their responsibility and do not want to pay support change jobs frequently in order to avoid court orders. Another problem with garnishment of wages is that in North Carolina, especially in rural counties, the employers who do not want to bother with the paperwork of garnishment will fire their employees or will pay them under the table in order to avoid the garnishment order. Although I tell the fathers they have a legal remedy if the employer fires them, the reality is that the employers find another excuse to fire the employee.

14. Because the legal system is not effective in extracting child support from unwilling fathers, it becomes the responsibility of a District Court Judge to try to convince irresponsible fathers to take responsibility for their children.

15. As a result of the standard filing unit regulations, I can no longer encourage fathers to take responsbility [sic] for their children by talking to them about the importance of removing their children from the welfare rolls. They can no longer free their children from welfare unless they can pay enough money to support the entire family. Most of these fathers are making minimum wage, and they will never be able or willing, to pay child support for children not their legal responsibility and thus they cannot even rescue their own child. Many of these fathers grew up on welfare and they are very sensitive to the invasion of privacy the household experiences when the social workers come into their homes and to the lack of a father involved in their lives. They know and understand the pride the child feels when he or she can say "my daddy supports me." These fathers know first hand that the children will grow up knowing that they are on welfare and that their mothers depend for support on a check each month from the Department of Human Resources and that food stamps buy the groceries. It isn't the same as financial and emotional support from your own father.

16. It is my experience that responsible people obey laws because they have something to lose—their money, their reputation, their freedom, or their pride. A substantial portion of our population has no money or reputation. When we take away their pride they have nothing to lose but 30 days in jail and there the whole scenario begins again.

This, the 13th day of September, 1985.

/s/ PATRICIA S. HUNT
Patricia S. Hunt, Affiant

SWORN TO and subcribed before me this,
the 13th day of September, 1985.

/s/ LORETTA T. COBLE
Loretta T. Coble
Notary Public

My Commission Expires September 14, 1988

NORTH CAROLINA)
) **AFFIDAVIT**
WAKE COUNTY)

I, James Richardson, duly sworn, do depose and say:

1. I live in Raleigh, North Carolina, and am the father of Jermaine Medlin.

2. Since the time Jermaine was born, I have been involved in his care and support. I have provided clothing, food and diapers for Jermaine, and have paid some of the household bills for Jermaine's mother, Mary Medlin. I have occasionally bought gifts for some of Mary Medlin's other children.

3. After Mary Medlin applied for AFDC for her other children, she told me that Jermaine would have to be included in the AFDC applicaton. Because I was taking care of him, I did not think he should be on public assistance and objected to this. She said that if Jermaine were not placed on AFDC, she would lost her AFDC for all her other children. Upon learning that, I reluctantly consented to having Jermaine placed on the AFDC grant.

4. Shortly after Jermaine was placed on the AFDC grant, I was contacted by Nancy Dickerson at the Child Support Enforcement Unit in Wake County. She requested that I sign a voluntary support agreement to pay approximately $165 per month. I asked if all the money would go to Jermaine she explained that if I paid that amount, only $50 would go to my child, and the rest would be kept by the state to pay for Ms. Medlin's AFDC grant. I told her that I did not think that was right because Jermaine had never been on AFDC and the state should not get Jermaine's support. Although I was, and am, interested and willing to support my son, I refused to sign the agreement unless the money would go to Jermaine.

5. Soon after that meeting, a sheriff came to my job to serve me with a warrant for criminal non-support, case

number, 85 CR 10961, Wake County. I was not there and had to pick up the warrant at the sheriff's office.

6. I hired an attorney to assist me with this case because I did not believe I should have to pay support that would not be used for my own child. My attorney was unable to obtain the results I sought, which would have allowed my child to receive all my support. He advised me to sign a support agreement in the amount of $136 a month, which I reluctantly did.

/s/ JAMES LOUIS RICHARDSON JR
James Richardson

SWORN TO and subscribed before me
this 18 day of July, 1985.

/s/ RITA H. HARRIS
Rita H. Harris
Notary Public

My Commission Expires: 14 July 1987

NORTH CAROLINA)
) **SUPPLEMENTAL AFFIDAVIT**
WAKE COUNTY)

I, Dianne Thomas, being duly sworn, depose and say:

1. I have received no direct child support from John Pennington, the father of my son Sherrod, since April 11, 1985.

2. I was informed by my worker in the Wake County IV-D Unit that she had a meeting with John Pennington about support for Sherrod. On May 22, 1985, John Pennington signed a Voluntary Support Agreement and Order in Wake County 85 CVD 3433. This Agreement requires him to pay child support of $87 month, beginning 7/1/85.

3. As far as I know, John Pennington did pay the support due for July, because I received a $50 disregard check at the end of August.

4. Since April, 1985 when Mr. Pennington stopped paying support voluntarily, he has not visited Sherrod. Prior to that time, he visited Sherrod on a regular basis, generally taking his son with him to his home in Durham every other weekend.

5. Mr. Pennington is extremely opposed to his son being on welfare benefits, and has told me that he stopped seeing his son because I now receive AFDC for Sherrod.

6. Sherrod is very upset that his father no longer visits him. He frequently asks me why his daddy does not come to see him anymore. Since the time his father has stopped visitation, Sherrod has begun to wet his bed on a frequent basis. Also since the visitation stopped, Sherrod has become much more disruptive, especially in school. Furthermore, his performance in school seems to have declined.

7. It is my opinion that the lack of visitation with his father has severely affected Sherrod, causing the bedwetting, disruptive behavior and poor school performance. I

cannot think of any other aspects of Sherrod's life which have changed or might have caused these behavioral problems.

8. My AFDC check is currently $246 per month. If John Pennington pays support as required by the order, I will be entitled to the $50 disregard at the end of the month following the month the support is paid.

This the 16th Day of September, 1985.

/s/ DIANNE THOMAS
Dianne Thomas

SWORN TO and subscribed before me
this 16th day of September, 1985.

/s/ GERALDINE B. SANDEN
Geraldine B. Sanden
Notary Public

My Commission Expires: August 20, 1990

Mullins/yb

STATE OF NORTH CAROLINA

Wake County

File No. 85CVD 3433

Film No.

In the General Court of Justice
IV-D# 487113 District Court Division

Plaintiff: Wake Co., ex rel Dianne Thomas

ID # 20020143850

Address: 914 E. Lane St.

City, State, Zip: Raleigh, NC 27601'

VOLUNTARY SUPPORT AGREEMENT AND ORDER

G.S. 110-132, 133

VERSUS

Defendant's D.O.B.	Race	Social Security Number
02/01/43	B	243-64-4711

Defendant: John Pennington

Address: 32 Burgess Lane

City, State, Zip: Durham, N. C. 27707

Defendant's employer: Roadway Express

Address:

City, State, Zip: Durham, NC

I, the undersigned reside at the address stated above and acknowledge that I am a responsible parent as defined in G.S. 110-129(3) and do freely and voluntarily agree to contribute to the support of my dependent child or children named below:

NAME OF CHILD	Date of Birth	ADDRESS
John Sherrod Thomas	02/21/78	914 E. Lane St., Raleigh, NC

I agree to make payments to the Clerk of Superior Court of the county named below to be used for the support of my dependent child or children to be disbursed as follows: **Delivered to the N.C. Dept. of Human Resources for so long as the dependent child(ren) receive(s) public assistance or the caretaker requests child support collection services; but if no public assistance funds are being expended for the dependent child(ren) and the caretaker desires no further child support collection services, the clerk shall direct payments to the caretaker of the dependent child(ren) for the care and benefit of such child(ren).**

I agree that no credit will be given for payments, gifts, or purchases for minor children ~~other that set out in this order.~~

Amount of payment	Date 1st payment due	Date subsequent payment due	County to which payment to be made
$ 87.00	07/01/85	Monthly	Wake

I further agree to pay the following sum as reimbursement for past public assistance paid for my dependent child or children according to the terms listed below.

Amount of reimbursement and terms of payment

AOC-CV-607
Rev. 2/85

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I fully understand that this Agreement to Support when duly signed by me and when approved by a District Court Judge and filed in the office of the Superior Court Clerk shall have the same force and effect, retroactively and prospectively, as an order of Support in District Court. Further, I understand that this Agreement may be enforced and modified in the same manner as provided by law for Orders of Child Support. I agree to pay the costs of court in this action.

Date	Signature of defendant
May 22, 1985	John Pennington

I certify that the defendant personally appeared before me this day and acknowledged the due execution of this instrument.

Date	Signature
05/22/85 SEAL	Joanne W Brannon
State	**Title of certifying officer**
North Carolina	~~Asst./Deputy Clerk of Court~~ Notary

My Commission Expires 11-24-86

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INSTRUCTIONS

All payments under this agreement should be in the form of cash, money order or official bank check, made payable to the Clerk of Superior Court and must be made at or mailed to the Office of the Clerk before the due date. Any delinquency may be punishable by civil contempt of court. Please note the file number shown on the reverse with all correspondence.

ORDER

The voluntary support agreement duly executed on the reverse side is hereby, approved and hence forth shall have the same force and effect, retroactively and prospectively, in accordance with the terms of this agreement, as an Order of the Court and shall be enforceable and subject to modification in the same manner as is provided by law for orders of this Court entered in Child Support Cases.

Date	5 June 85
Signature of Judge	Mary L Cothwell

THE SECRETARY OF HEALTH AND HUMAN SERVICES
Washington, D.C. 20201

The Honorable George Bush
President of the Senate
Washington, DC 20510

25 May 1983

Dear Mr. President:

Enclosed for the consideration of the Congress is a draft bill "To amend the Social Security Act to make certain program and administrative improvements in the programs of aid to families with dependent children and supplemental security income, and for other purposes." When enacted, the bill may be cited as the "Social Welfare Amendments of 1983". Additionally, a section-by-section summary of the bill, and a table showing the budgetary effects of each section for fiscal years 1984 through 1987, are enclosed for your convenience.

The draft bill carries out recommendations in the President's budget for fiscal year 1984. These amendments will assure that limited Federal and State resources are spent as effectively as possible. To this end, several amendments to the program of aid to families with dependent children carry forward the thrust of improvements made by the Omnibus Budget Reconciliation Act of 1981 and the Tax Equity and Fiscal Responsibility Act of 1982. The WIN program would be repealed; in its place, the community work experience program is strengthened and made mandatory, and employment search must be required of applicants and recipients. Emphasis is placed on assisting applicants and recipients to become self-reliant as soon as possible and to move back into regular employment and avoid long-term welfare dependency.

Additionally, this bill contains a group of related amendments to establish uniform rules on the family members who must file together for AFDC, and the situa-

tions in which income must be counted. In general, the parents, sisters, and brothers living together with a dependent child must all be included; the option of excluding a sibling with income, for example, would no longer be available. Similarly, if a minor mother living with her own parents is receiving aid, her parents' income must also be taken into consideration. Improvements such as these are expected to result in payment of AFDC that much more realistically reflects the actual home situation.

The AFDC amendments made by title I of this bill are expected to reduce Federal costs by $646 million in fiscal year 1984 and $841 million in fiscal year 1985 (including savings attributable to repeal of the Work Incentive (WIN) program authorization). The SSI amendment made by section 202 would reduce Federal costs by $14 million and $15 million in fiscal years 1984 and 1985, respectively.

We urge that the Congress promptly enact this proposed legislation ensuring important fiscal and administrative improvements.

We are advised by the Office of Management and Budget that enactment of the enclosed draft legislation would be in accord with the program of the President.

Sincerely,

/s/ MARGARET W. HECKLER

Margaret W. Heckler
Secretary

Enclosures

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD; LORETTA GILLIARD; THOMAS GILLIARD; DANA GILLIARD; GREGORY GILLIARD; REGINALD GILLIARD; AND SAMUEL DAVIS JR. GILLIARD, MINORS, BY THEIR MOTHER AND NEXT FRIEND, BEATY MAE GILLIARD, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

PHILLIP J. KIRK, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, IN HIS OFFICIAL CAPACITY, AND C. BARRY MCCARTY, CHAIRMAN, NORTH CAROLINA SOCIAL SERVICES COMMISSION, IN HIS OFFICIAL CAPACITY, DEFENDANTS AND THIRD-PARTY PLAINTIFFS,

v.

OTIS R. BOWEN, M.D., SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THIRD-PARTY DEFENDANT.

MOTION TO STAY MEMORANDUM OF DECISION PENDING APPEAL

NOW COME defendants herein, pursuant to Rule 62(d) of the Federal Rules of Civil Procedure, and move this Court for an order staying the Court's order filed May 7, 1986, ordering defendants to pay to plaintiffs certain sums in AFDC benefits and to pay plaintiffs costs and attorneys fees. Defendants have given notice of appeal in the above captioned case and it would be premature to take certain

ordered administrative steps until the issues on appeal are ultimately decided. Because defendants are certain State officials sued in their official capacities, and who have or will have adequate resources to pay the award of money to plaintiff if the order appealed from is modified or affirmed by the Circuit Court, defendants move that no supersedeas bond be required as a condition to the entry of the stay order.

This the 15th day of May, 1986.

Respectfully submitted,

LACY H. THORNBURG
Attorney General

/s/ CATHERINE C. MCLAMB
Catherine C. McLamb
Associate Attorney General

/s/ LEMUEL W. HINTON
Lemuel W. Hinton
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Releigh, NC 27602
Telephone: (919) 733-4618

Supreme Court of the United States

No. 86-509

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BEATY MAE GILLIARD, ET AL.

December 8, 1986

APPEAL from the United States District Court for the Western District of North Carolina.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with 86-564, *Phillip J. Kirk, Secretary, North Carolina Department of Human Resources, et al.* v. *Beaty Mae Gilliard, et al.*, and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 86-564

PHILLIP J. KIRK, SECRETARY OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL., APPELLANTS

v.

BEATY MAE GILLIARD, ET AL.

December 8, 1986

APPEAL from the United States District Court for the Western District of North Carolina.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with 86-509, *Otis R. Bowen, Secretary of Health and Human Services* v. *Beaty Mae Gilliard, et al.*, and a total of one hour is allotted for oral argument.

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Nos. 86-509 and 86-564

In the Supreme Court of the United States

OCTOBER TERM, 1986

Supreme Court, U.S.
FILED
FEB 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BEATY MAE GILLIARD, ET AL.

PHILLIP J. KIRK, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL., APPELLANTS

v.

BEATY MAE GILLIARD, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE FEDERAL APPELLANT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

WILLIAM KANTER
CARLENE V. MCINTYRE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

RONALD E. ROBERTSON
General Counsel
Department of Health and Human Services
Washington, D.C. 20201

58/90

QUESTION PRESENTED

Whether Section 402(a)(38) of the Social Security Act, 42 U.S.C. (Supp. III) 602(a)(38), which provides that all parents, brothers and sisters who live together shall constitute a single filing unit for the Aid to Families with Dependent Children program, is unconstitutional as violative of the Takings Clause, the Due Process Clause or the Equal Protection component of the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-509

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BEATY MAE GILLIARD, ET AL.

No. 86-564

PHILLIP J. KIRK, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL., APPELLANTS

v.

BEATY MAE GILLIARD, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE FEDERAL APPELLANT

OPINIONS BELOW

The decision of the district court holding the relevant provisions of the Social Security Act unconstitu-

tional is reported at 633 F. Supp. 1529 (J.S. App. 13a-92a).[1] Subsequent decisions and orders of the district court are unreported (J.S. App. 1a-12a, 98a-109a).

JURISDICTION

The judgment of the district court (J.S. App. 93a) was entered on July 14, 1986. The decision of the district court denying motions for reconsideration was entered on August 25, 1986 (J.S. App. 106a-109a). A notice of appeal to this Court was filed on July 29, 1986, and an amended notice of appeal was filed on September 16, 1986 (J.S. App. 94a-97a). The jurisdictional statement in No. 86-509 was filed on September 26, 1986. The jurisdictional statement in No. 86-564 was filed on September 29, 1986. On December 8, 1986, the Court noted probable jurisdiction and consolidated the two cases for argument. The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> [N]or shall any person be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 402(a)(38) of the Social Security Act, 42 U.S.C. (Supp. III) 602(a)(38), provides in pertinent part:

> A State plan for aid and services to needy families with children must—
>
> * * * * *

---

[1] "J.S. App." refers to the appendix to the jurisdictional statement in No. 86-509.

provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter) * * *.

Section 402(a)(8)(A)(vi) of the Social Security Act, 42 U.S.C. (Supp. III) 602(a)(8)(A)(vi), provides in pertinent part:

A State plan for aid and services to needy families with children must—

* * * * *

provide that, with respect to any month, in making the determination under paragraph (7), the State agency—

* * * * *

(vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title) * * *.

Section 457(b)(1) of the Social Security Act, 42 U.S.C. (Supp. III) 657(b)(1), provides in pertinent part:

> The amounts collected as support by a State pursuant to a plan approved under this part during any fiscal year beginning after September 30, 1976, shall (subject to subsection (d) of this section) be distributed as follows:
>
> > (1) the first $50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month * * *.

STATEMENT

This case involves a constitutional challenge to one of several statutory amendments made to the Aid to Families with Dependent Children (AFDC) program in 1984. Those statutory changes were designed to allocate finite federal resources to those families that are most in need of financial help. Perceiving certain shortcomings in the pre-existing structure of the AFDC program, Congress sought to modify the program in a way that more realistically reflects the actual fiscal situation of families that are candidates for public assistance. As a result of those amendments, some families no longer qualify for AFDC benefits and other families receive smaller grants.

Appellees are members of families whose AFDC benefits were diminished, interrupted, or terminated in accordance with the 1984 amendments. In this suit, appellees challenge the constitutionality of the statutory provision that requires all parents, brothers and sisters who reside together to be considered as a family filing unit for AFDC purposes. 42 U.S.C.

(Supp. III) 602(a)(38). The district court declared this statute unconstitutional and enjoined its enforcement. The court reasoned that the statute violates the Takings Clause of the Fifth Amendment by denying minor siblings the right to enjoy unrestricted access to their separate income. The court also held that the statute violates the Due Process Clause by creating a classification that discriminates against family members and that burdens family decisions to live together.[2]

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[2] The only court of appeals that has considered the question has rejected constitutional challenges to the statute at issue here. See *Gorrie* v. *Bowen*, No. 85-5394 (8th Cir. Jan. 16, 1987), rev'g 624 F. Supp. 85 (D. Minn. 1985); *White Horse* v. *Bowen*, No. 86-5005 (8th Cir. Jan. 16, 1987), rev'g 627 F. Supp. 848 (D.S.D. 1985). Most district courts likewise have upheld the statute. See *Bradley* v. *Austin*, No. 86-175 (E.D. Ky. Jan. 5, 1987); *Childress* v. *Hill*, No. 85-Z-1459 (D. Colo. Jan. 21, 1986), appeal pending, No. 86-1514 (10th Cir.); *Creaton* v. *Heckler*, 625 F. Supp. 26 (C.D. Cal. 1985) (denial of preliminary injunction), No. CV-85-3306-R (May 16, 1986) (decision on the merits); *Huber* v. *Blinzinger*, 626 F. Supp. 30 (N.D. Ind. 1985); *Maryland Dep't of Human Resources* v. *United States Dep't of Health & Human Services*, No. M-86-605 (D. Md. Apr. 22, 1986), appeal pending, No. 86-3076 (4th Cir.); *Rosado* v. *Bowen*, No. H-85-171(JAC) (D. Conn. Oct. 9, 1986); *Oliver* v. *Ledbetter*, 624 F. Supp. 325 (N.D. Ga. 1985), appeal pending, No. 86-8037 (11th Cir.); *Sherrod* v. *Hegstrom*, 629 F. Supp. 150 (D. Or. 1985), appeal pending, No. 86-3632 (9th Cir.); *Shonkwiler* v. *Heckler*, 628 F. Supp. 1013 (S.D. Ind. 1985) (denial of preliminary injunction), No. IP 84-1612-C (Aug. 11, 1986) (decision on the merits), appeal pending, No. 86-268 (7th Cir.); *Showers* v. *Cohen*, 645 F. Supp. 217 (M.D. Pa. 1986), appeal pending, No. 86-5795 (3d Cir.); *Van Berg* v. *Shinpoch*, No. C85-2069C (W.D. Wash. Apr. 18, 1986), appeal pending, No. 86-3870 (9th Cir.); *Van Horn* v. *Hegstrom*, No. 85-1768RE (D. Or. Feb. 20, 1986). Accord, *Park* v. *Coler*, 493 N.E.2d 130 (Ill. 1986) (federal government not a party). Two district courts,

A. THE AFDC PROGRAM

1. Congress established the AFDC program in 1935. Social Security Act, ch. 531, Tit. IV, §§ 401-406, 49 Stat. 627-629, 42 U.S.C. (& Supp. III) 601-676. The program is designed to provide financial assistance to needy families with dependent children. A "dependent child" is a needy child who has been deprived of parental care or support by the death, incapacity or "continued absence from the home" of a parent (42 U.S.C. 606(a)).[3]

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aside from the court below, have held the statute unconstitutional. *Lesko* v. *Bowen*, 639 F. Supp. 1152 (E.D. Wis. 1986) (granting preliminary injunction), direct appeal docketed, No. 86-744 (Nov. 5, 1986); *Baldwin* v. *Ledbetter*, 647 F. Supp. 623 (N.D. Ga. 1986), direct appeal docketed, No. 86-1140 (Jan. 9, 1987), stay pending appeal granted, No. A-448 (Dec. 18, 1986) (Powell, Circuit Justice). Two district courts have invalidated the regulatory scheme without deciding its constitutionality. See *Johnson* v. *Cohen*, No. 84-6277 (E.D. Pa. Jan. 10, 1986), appeal pending, No. 86-1101 (3d Cir.); *Elam* v. *Barry*, No. C-1-86-142 (S.D. Ohio Dec. 31, 1986). Preliminary injunctions have been granted in favor of plaintiffs on statutory rather than constitutional grounds in *Frazier* v. *Pingree*, 612 F. Supp. 345 (M.D. Fla. 1985); *Lee* v. *Pingree*, No. 85-644-Civ.-T-15 (M.D. Fla. Feb. 13, 1986); *Gibson* v. *Sallee*, No. 3-85-1283 (M.D. Tenn. Mar. 6, 1986); *Howell* v. *Bowen*, No. 86-0677L (D.R.I. Nov. 13, 1986); *Short* v. *Heckler*, No. C85-2248 (W.D. Wash. Jan. 6, 1986); *Collins* v. *Barry*, 644 F. Supp. 249 (N.D. Ohio 1986) (federal government not a party). A preliminary injunction was denied in *Ardister* v. *Mansour*, 627 F. Supp. 641 (W.D. Mich. 1986).

[3] When originally enacted, the program was entitled "Aid to Dependent Children." 49 Stat. 627. In 1962, Congress changed the title to "Aid and Services to Needy Families with Children" to reflect more accurately the character of the program. Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 104(a)(1), 76 Stat. 185; see S. Rep. 87-1589, 87th Cong., 2d Sess. 14 (1962).

In order to qualify for AFDC benefits, a family must meet certain standards of financial need, determined by its income and resources. 42 U.S.C. (Supp. III) 602(a). Each state establishes a statewide standard of need, "which is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974); see 42 U.S.C. (Supp. III) 602(a)(23). Further, each state specifies "how much assistance will be given, that is, what 'level of benefits' will be paid." *Rosado* v. *Wyman*, 397 U.S. 397, 408 (1970). The states have " 'broad discretion in determining both the standard of need and the level of benefits.' " *Heckler* v. *Turner*, 470 U.S. 184, 189 n.3 (1985) (quoting *Shea* v. *Vialpando*, 416 U.S. at 253). A family is eligible for AFDC benefits if its countable income and resources do not exceed state-specified limits, subject to federally-prescribed maximums. 42 U.S.C. (Supp. III) 602(a)(7)(B), (8) and (17).[4] The amount of benefits paid to the family is based upon the difference between the family's countable income and the benefit level established by the state for a family of that size.[5]

---

[4] We use the term "countable income" to reflect the fact that the states must exclude certain monetary receipts from income for purposes of determining a family's AFDC eligibility and benefits. For example, in determining the countable income of an AFDC family, the state must disregard income earned from part-time employment by a dependent child who is also a full- or part-time student (42 U.S.C. (Supp. III) 602(a)(8)(A)).

[5] At its option, a state may provide additional assistance for certain "special needs." 45 C.F.R. 233.20(a)(2)(v). Such "special needs" payments may cover such circumstances as special nutritional needs or diets, utilities, transportation, education, day care, pregnancy-related needs, clothing, and catastrophic events. Thirty states, the District of Columbia

Prior to 1984, the statute "d[id] not define what constitutes an AFDC family." Staff of House Comm. on Ways and Means, 98th Cong., 2d Sess., *WMCP: 98-24, Description of the Administration's Fiscal Year 1985 Budget Recommendations Under the Jurisdiction of the Comm. on Ways and Means* 29 (Comm. Print 1984) [hereinafter *WMCP:98-24*]. Nor did the statute require that all family members residing together be included in the "filing unit" for AFDC purposes. Prior to 1984, therefore, a family applying for AFDC assistance could have excluded from the filing unit those members with income that, if counted in the eligibility determination, would have reduced the amount of the family's AFDC benefits or would have terminated its eligibility. I Senate Comm. on Finance, 98th Cong., 2d Sess., *S. Prt. 98-169, Deficit Reduction Act of 1984*, at 980 (Comm. Print 1984) [hereinafter *S. Prt. 98-169*]. Moreover, in anticipation that one of its members was about to receive additional income, a family could have removed that member from the AFDC filing unit, thus enabling the remaining family members to continue to qualify for benefits.

2. In 1984, Congress established a standard filing unit for the AFDC program. This result was accomplished by amending the statute explicitly to require that a parent and all siblings who reside with a dependent child be included in the filing unit when a family seeks or receives AFDC benefits. Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369,

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and Guam have chosen to make AFDC "special needs" payments. See generally Office of Family Assistance, Social Security Administration, U.S. Dep't of Health & Human Services, *Characteristics of State Plans for Aid To Families With Dependent Children Under the Social Security Act Title IV-A* (1986).

§ 2640(a), 98 Stat. 1145, 42 U.S.C. (Supp. III) 602 (a)(38). The Senate Finance Committee explained the purpose of this amendment as follows (*S. Prt. 98-169*, at 980):

> *Present Law*
>
> There is no requirement in present law that parents and all siblings be included in the AFDC filing unit. Families applying for assistance may exclude from the filing unit certain family members who have income which might reduce the family benefit. For example, a family might choose to exclude a child who is receiving social security or child support payments, if the payments would reduce the family's benefits by an amount greater than the amount payable on behalf of the child.
>
> * * * * *
>
> *Explanation of Provision*
>
> The provision approved by the Committee would require States to include in the filing unit the parents and all dependent minor siblings (except SSI recipients and any stepbrothers and stepsisters) living with a child who applies for or receives AFDC. * * *
>
> This change will end the present practice whereby families exclude members with income in order to maximize family benefits, and will ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole.

The committee estimated that this change would save $455 million during 1984-1987 (*S. Prt. 98-169*, at 981). See 130 Cong. Rec. S4099 (daily ed. Apr. 9, 1984) (remarks of Sen. Dole).

In proposing this amendment, the Secretary explained that adoption of a standard filing unit would "result in payment of AFDC that much more realistically reflects the actual home situation" (Letter from Secretary Heckler to Vice President Bush (May 25, 1983) (J.A. 168-169)). In adopting the Secretary's proposal, Congress recognized that family members who live together generally share their income and expenses, and hence that a family including a member with separate countable income is less needy than a comparable family in which no member has any (or as much) such income. *S. Prt. 98-169*, at 980. Under the law as amended in 1984, therefore, all persons listed in the DEFRA amendment must be included in the filing unit when a family applies for AFDC. The countable income received by all such persons is then aggregated in determining the family's eligibility for benefits and the level of benefits that it will receive if eligible.[6]

The effect of the 1984 amendment may be illustrated by a simplified example. Assume a family of four, consisting of three children and one parent, and assume that one of the children has separate countable income of $200 per month, representing the family's only income. Prior to the 1984 amendment, the family could have excluded that child from the filing unit.

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[6] The Secretary promulgated the following regulation (45 C.F.R. 206.10(a)(1)(vii)) to implement the filing-unit amendment:

> For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:
>
> (A) Any natural or adoptive parent, or stepparent (in the case of States with laws of general applicability); and
>
> (B) Any blood-related or adoptive brother or sister.

The family would then have constituted a filing unit of three (one parent and two children) with no income, and it would have received the maximum AFDC benefit for a family of that size, perhaps $250. Thus, when the excluded child's separate income was added in, the aggregate monthly income of all members of the family would have been $450 ($250 in AFDC benefits plus $200 separate income).

Under the statute as amended in 1984, by contrast, the family, if it chooses to apply for AFDC assistance, must include the income-receiving child in the filing unit (42 U.S.C. (Supp. III) 602(a)(38)). It is now a filing unit of four (one parent and three children) with a monthly income of $200. If the state-prescribed maximum grant for a family of that size is $300 per month, the monthly AFDC benefits would be $100 ($300 minus $200) which, when added to the child's income, brings the family up to the state's maximum grant level ($300).

3. In amending the statute in 1984, Congress specified a slightly different scheme where the child's separate income takes the form of child-support payments. This difference results principally from three statutory provisions: Section 602(a)(26)(A), enacted in 1975, which requires AFDC applicants as a condition of eligibility to assign to the state any accrued right to child support; and Sections 602(a)(8)(A)(vi) and 657(b)(1), enacted as part of the 1984 amendments, which provide that the first $50 of monthly child support collected by the state is to be remitted to the family and not counted in determining its AFDC eligibility. The net effect of these three provisions is that, under the DEFRA filing-unit rule, families whose members receive child-support income are never worse off, and will typically be up to $50 a month

better off, than comparable families whose members receive other types of countable income.

Congress enacted the child-support assignment provision in 1975 in order to remedy widespread noncompliance with parental support obligations. As early as 1950, Congress had implemented various measures aimed at "securing support from the deserting or abandoning parent in every possible case." H.R. Rep. 90-544, 90th Cong., 1st Sess. 100 (1967); see Social Security Act Amendments of 1950, ch. 809, § 321(b), 64 Stat. 549-550. Those measures did not produce the desired results. By 1974, the problem of support-payment delinquency had reached the point where almost 25% of AFDC children were covered by support orders, but few of these orders were obeyed even though absent parents had the ability to pay. See S. Rep. 93-1356, 93d Cong., 2d Sess. 42-44 (1974); 120 Cong. Rec. 38196-38198 (1974) (remarks of Rep. Griffiths). Congress concluded in 1974 that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents" (S. Rep. 93-1356, *supra*, at 42), and that the AFDC program in particular had evolved into a publicly-funded substitute for unenforced parental support obligations.

Among the remedies that Congress implemented in 1975 to address this problem was a provision that requires an AFDC applicant, as a condition of eligibility, to assign to the state any accrued right to child support that she or her children may possess. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(c)(5)(C), 88 Stat. 2359, 42 U.S.C. 602(a)(26)(A). The purpose of this provision was to relieve the deserted mother of the burden of enforcing the abandoning father's child-support obligations, and to transfer that burden to the states with their greater

resources and better collection techniques. See *Sorenson* v. *Secretary of the Treasury*, No. 84-1686 (Apr. 22, 1986), slip op. 1-2. The assignment provision of course worked no financial detriment to the AFDC family. Previously, any child support actually received by an AFDC recipient would have been counted as income, and the family's AFDC benefits would have been *reduced* by an identical amount. When child support is assigned to the state, the family's countable income is accordingly reduced, and its AFDC benefits are *increased* by an identical amount. The enactment of the assignment provision in 1975 thus created no substantive distinction between child support and other income for AFDC purposes. It simply established a different procedural mechanism by which child support was to be taken into account in determining AFDC eligibility and benefits levels.

From 1975 to 1984, the assignment provision operated only when a family applying for AFDC benefits chose to include in the filing unit the child who received the support payments.[7] Congress did not

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[7] Such a child was typically included in situations like the following: (1) when the support payment was smaller than the increase in AFDC benefits that the family would realize by applying as a larger filing unit; (2) when the non-custodial parent was delinquent or irregular in making child-support payments and the family concluded that it could maximize total income by including the child in the filing unit; and (3) when the child-support recipient was likely to incur substantial medical bills. In the latter situation, the family might have chosen to include the child-support recipient in its AFDC filing unit in order to obtain Medicaid benefits for that child as one who was "categorically needy," that is, as someone automatically entitled to Medicaid benefits without having to incur medical expenses in excess of the state's "spenddown" amount. See generally *Atkins* v. *Rivera*, No. 85-632 (June 23, 1986), slip op. 2-3.

amend the assignment provision in 1984. The effect of Congress's adoption of the standard filing unit in 1984, however, was that all minor siblings residing together must now be included in the filing unit; that all countable income of such children must now be considered in determining the family's AFDC benefits; and that, where such income consists of child support, an assignment to the state of all child support is now required as a condition of AFDC eligibility.

Congress recognized in 1984 that the child support assigned to the state in consequence of the new filing-unit provision might sometimes be greater than the marginal increase in AFDC benefits obtained by the family by filing as a larger unit. To mitigate that potential disadvantage, Congress added two companion provisions to the statute in 1984. Pub. L. No. 98-369, § 2640(b)(1) and (c), 98 Stat. 1145-1146, 42 U.S.C. (& Supp. III) 602(a)(8)(A)(vi) and 657(b)(1). Those sections provide that the first $50 of any monthly child support collected by the state pursuant to the assignment provision is to be paid by the state directly to the child's caretaker relative, and that this $50 is to be disregarded in determining the family's AFDC eligibility and benefits.

The effect of these latter amendments may again be illustrated by an example. Assume the same family of four described in the example above, and assume that the child's $200 monthly income consists entirely of child support. Under the amended statute, that child would be included in the family filing unit for AFDC purposes; the $200 monthly child support would be assigned to the state; the first $50 of child support collected by the state would be remitted to the family; that $50 would be disregarded in determining the family's income for AFDC purposes; and the

family would be treated as a filing unit of four with no income, entitling it to $300 in monthly benefits. Unlike the family described in our earlier example, however, the family that assigned its child support would have an aggregate monthly income of $350 ($300 AFDC benefits and the additional $50 remitted from the state). Thus, while the assignment provision establishes a different procedural mechanism when a family member receives countable income in the form of child support, the resulting economic impact on the family is precisely the same as if that income had been derived from any other source, *except* that the family is also entitled to receive up to $50 extra from the state each month—a distinction that augments the family's income.

B. PROCEEDINGS IN THIS CASE

1. This case had its origin in a challenge to the operation of the AFDC program in North Carolina long before DEFRA was enacted. In 1971, a three-judge court invalidated a state rule that required child-support income to be considered a family resource when computing the family's eligibility for AFDC benefits; the court held that the rule was inconsistent with the federal statutory scheme then in effect and enjoined the rule's enforcement. *Gilliard* v. *Craig*, 331 F. Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972). Following the enactment of DEFRA and the promulgation of federal and state implementing regulations, appellees here, stating that they were members of the class certified by the district court in 1971, filed a motion for further relief asking the district court to enforce its 1971 injunction. The State of North Carolina filed a third-party complaint against the Secretary, contending

that the State's current rules comply with the federal regulations implementing the DEFRA filing-unit amendment, and contending that, if the State were found liable, the United States should be required to share in the payment of any AFDC benefits awarded.

2. On May 7, 1986, the district court issued its decision holding the DEFRA filing-unit provision unconstitutional (J.S. App. 13a-92a). The court first addressed appellees' statutory-construction arguments, the gist of which was that children who receive child support are not "needy" or "dependent" children, and hence that Congress had not intended to mandate their inclusion in the AFDG filing unit. See J.S. App. 48a-49a. The court rejected these arguments, concluding that the legislative history "clearly shows that the intent of the DEFRA amendment is to measure need by assessing the aggregated resources of all family members [and that] the option of choosing which members of a family may be included in the assistance unit is no longer available" (*id.* at 48a-49a). The court likewise rejected appellees' contention that state law would be violated if child-support income were counted as "a family financial resource," a contention based on the theory that North Carolina law permits a mother to spend such income "only on the child for whom the support has been obtained" (*id.* at 54a, 56a). The district court concluded that Congress's clear intent to include child support in AFDC calculations preempted state laws to the extent that they treated such income as the exclusive property of the child (*id.* at 52a, 59a-60a).

The court then proceeded to hold the statute unconstitutional (J.S. App. 61a-92a). First, the court concluded that the requirement that an AFDC applicant assign child-support income to the state effected a taking of private property without just compensation.

The "taking" that the court identified was the child's loss of "the right to enforce the fiduciary obligation that prohibited the mother from spending the money on anyone other than the designated child" (*id.* at 67a). The court recognized that, under the AFDC statutory scheme, "the child receiving child support income remains entitled to the full child support amount, as evidenced by the state's acquired right to institute legal action against a father who does not pay" (*ibid.*). But the court concluded that "the child can only maintain *unrestricted access* to the money if [he] lives in a household separate from his or her mother and half-brothers and sisters" (*ibid.* (emphasis in original)). The court regarded this economic effect as tantamount to depriving child-support recipients of "exclusive use of their money * * * on the basis of the composition of their family," theorizing that such children were required "to contribute a significant portion of their income to the state in the name of their needy half-siblings in order to reduce state and federal AFDC expenditures" (*id.* at 68a-69a (emphasis omitted)). The court characterized this statutory scheme as effecting a taking of private property for public use without just compensation (*id.* at 66a-69a) and "an unconstitutional tax on the supported child's membership in a particular type of family unit" (*id.* at 61a, 74a).

The district court also found the 1984 filing-unit amendment to violate principles of equal protection and substantive due process (J.S. App. 70a-89a). In this connection, the court concluded that it should impose a more rigorous degree of scrutiny than is ordinarily applicable to legislative decisions concerning the allocation of public welfare benefits. In the court's view, appellees did not simply challenge a govern-

mental decision to reduce AFDC benefits, but rather challenged "a governmental decision to intercept the delivery of *private* property, [namely,] the full child support amount ordinarily available from the father" (*id.* at 55a (emphasis in original)). "The impact of [Congress's] action on the child's fundamental associational rights and on a property right," the district court stated, "requires a more rigorous examination than [appellants] suggest" (*ibid.*).

Asserting that DEFRA's filing-unit provision strains a mother's ability to keep her family intact and causes "family income [to be] reduced from its already meager levels," the district court held that the statute unconstitutionally burdens family relationships (J.S. App. 78a). Relying on affidavits filed by appellees, by an urban anthropologist, and by a state judge, the court explained that the filing-unit amendment would "undoubtedly test these mothers' capacity to cope" and could cause the child and his mother to "lose access to the father's kin network" (*id.* at 79a). While acknowledging that the congressional objective of conserving limited fiscal resources is a legitimate one, the court held that "[t]he Constitution's consistent recognition and protection of family associational rights prevent the state and federal governments from using children's unchosen membership in a family that includes AFDC dependent half-sisters and brothers as the justification for the deprivation of property" (*id.* at 89a).

On July 3, 1986, the district court issued a final order enjoining the Secretary from "requiring state defendants mandatorily to include the parent and all children living in the household in the assistance unit and from requiring child support income received from the legally obligated parent of one of the children to be included in determining financial eligibility for

the rest of the family members" (J.S. App. 6a). The court also issued, on the same day, an order in response to the Secretary's motion for clarification. In that order, the court stated that it "finds the statute unconstitutional because it imposes a financial penalty on children receiving adequate child support" and that "[s]uch a deprivation of property based on a child's unchosen family membership violates due process and equal protection principles, as explained at length in the memorandum of decision" (*id.* at 8a).

On August 25, 1986, the district court denied motions for reconsideration in light of this Court's decision in *Lyng* v. *Castillo*, No. 85-250 (June 27, 1986). In *Castillo*, this Court reversed a district court decision which had held that a provision of the Food Stamp Act allocating benefits on the basis of single households composed of parents, children or siblings unduly burdened family associational rights and hence violated the equal protection component of the Due Process Clause. The district court below, in denying the motions for reconsideration, concluded that *Castillo* did not control the instant litigation. It stated that the classification here unduly penalizes persons "who are not free to change their living arrangements to preserve or augment their income," and it characterized the statute as confronting children with an unconstitutional choice "between parental relationships and financial survival" (J.S. App. 109a).

SUMMARY OF ARGUMENT

The district court has declared unconstitutional a carefully-considered statute designed to remedy a flaw in the AFDC eligibility scheme. The court's errors are largely traceable to its failure to perceive two propositions that we believe central to the proper resolution of this case. First, the family filing-unit

provision merely establishes a condition of eligibility for a public assistance program in which participation is voluntary. Second, the filing-unit provision does not discriminate against families that receive child support rather than some other form of income.

1. Congress decided in 1984 to ensure "that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole" (*S. Prt. 98-169*, at 980). Faced with the task of allocating finite government funds among a large number of potential recipients, a task made more difficult by an "overwhelming deficit crisis" (*ibid.*), Congress simply closed an existing loophole in the AFDC benefits scheme. It reasonably concluded that closely-related family members who reside together are likely to share the expense of common necessities and should be regarded as a single family unit.

That legislative determination, contained in the standard filing-unit provision, makes no distinction based on the source of countable income received by family members. *All* countable income received by a co-resident parent, brother or sister is to be taken into account in determining the level of benefits to which that family unit is entitled. The economic consequences of this provision are not affected by the source of the family's countable income, with one exception. If the otherwise countable income is received in the form of child-support payments, the first $50 of that income is disregarded in AFDC benefits calculations. Hence, an AFDC family that includes a child receiving monthly support payments of $50 or more will end up with $50 more in total income (after AFDC benefits are received) than a comparable family whose countable income is received from some other source.

2. The district court held nonetheless that the treatment of child-support payments under the amended statute effected a "taking" of private property in violation of the Fifth Amendment. That holding was based, not on Congress's redefinition of the filing unit in 1984, but on an entirely separate provision, enacted in 1975 (42 U.S.C. (& Supp. III) 602 (a)(26)(A)), that establishes "as a condition of eligibility for aid" that any applicant for AFDC benefits who has a right to support must assign that right to the state. To be sure, the assignment provision employs different procedural steps to take account of child-support income than are employed for other sorts of countable income. But though the procedures differ, no economic disadvantage is thereby visited upon the AFDC family. Other than the $50 disregard—which confers an added benefit on the family—the statutory treatment of child-support income through the assignment provision has the same impact on AFDC eligibility and benefits as any other countable income. After AFDC benefits are received, an AFDC family with child-support income has the same or higher level of total income as an AFDC family whose income derives from some other source. In the absence of any economic deprivation flowing from the challenged statute, there cannot be a "taking" within the meaning of this Court's decisions.

The district court's "taking" analysis is also flawed by its assumption that members of families with income near subsistence levels do not share the cost of obtaining life's necessities. In drafting the challenged statute, of course, Congress made precisely the opposite finding about the realities of family life, just as it had done in drafting the portions of the Food Stamp Act that this Court upheld in *Lyng*

v. *Castillo*. The district court rejected Congress's recognition of familial sharing, stressing instead the minor child's supposed property right under state law to have "exclusive" and "unrestricted" access to money paid as child support by his non-custodial parent (J.S. App. 69a, 67a). The district court's description of the family as a loose federation of autonomous economic entities is not only wrong as a matter of state law, it has no basis in common sense. And it reflects a marked lack of deference to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters* v. *National Association of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 13.

3. The district court also erred in concluding that the DEFRA filing-unit provision is subject to heightened or "more rigorous" scrutiny under the Due Process Clause. As this Court held last Term in *Lyng* v. *Castillo*, family members do not constitute a "suspect" or "quasi-suspect" class. Furthermore, the statute does not burden any fundamental family rights. The economic effect of the filing-unit provision is that fewer public funds will be expended in making AFDC grants to some families—those with more countable income received by family members—than will be expended in making AFDC grants to families with less income. But that does not prevent any family members from living together. Indeed, that financial effect no more interferes with family choices than would any Congressional decision to cut benefit levels. The statute simply adjusts benefits in light of the cooperative arrangements that families generally can and do employ. The filing-unit provision is rationally related to the legitimate end of allocating public funds to those families that

are most in need, and it does not amount to a constitutionally significant intrusion on family living arrangements.

ARGUMENT

CONGRESS ACTED CONSTITUTIONALLY IN REQUIRING THAT ALL PARENTS, BROTHERS AND SISTERS WHO LIVE TOGETHER SHALL FILE AS A SINGLE FAMILY UNIT FOR AFDC PURPOSES

A. The Statute Requires That Siblings Who Receive Child Support Be Included In The AFDC Filing Unit, Regardless Of Such Siblings' Individual Needs for Assistance

1. Congress enacted the family filing-unit provision in 1984 to ensure that AFDC eligibility and benefits calculations realistically take into account all countable income received by family members who reside together. Confronting the need to allocate finite government funds among a rapidly growing number of potential recipients, a difficult task exacerbated by severe budget constraints, Congress sought to ensure "that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole" (*S. Prt. 98-169*, at 980).

Congress therefore amended the statute to provide (42 U.S.C. (Supp. III) 602(a)(38)) that, in ascertaining the need of a dependent child for AFDC assistance, the state must include in the eligibility determination "any brother or sister of such child," so long as that brother or sister "is living in the same home as the dependent child" and "meets the conditions described in clauses (1) and (2) of section 606(a) of this title." The condition described in Section 606(a)(1) is that the sibling must have "been deprived of parental support or care by reason of the

death, continued absence from the home * * *, or physical or mental incapacity of a parent" (42 U.S.C. 606(a)(1)). The condition described in Section 606 (a)(2) is that the sibling must be "under the age of eighteen" or, "at the option of the State, under the age of nineteen and a full-time student" (42 U.S.C. 606(a)(2)(A) and (B)).

Consistent with the language of the statute, the Secretary has promulgated a regulation specifying that, "in order for the family to be eligible" for AFDC benefits, "an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance: * * * [a]ny blood-related or adoptive brother or sister" (45 C.F.R. 206.10(a)(1)(vii)(B)). Under this regulation, a dependent child's co-resident minor siblings must be included in the AFDC filing unit regardless of whether or not they have separate income, and regardless of whether their separate income consists of child support or something else. Under well-settled principles of statutory construction, the reasonable interpretation of a statute by the agency to which Congress has entrusted the statute's administration is entitled to deference. *Atkins* v. *Rivera*, No. 85-632 (June 23, 1986), slip op. 7; *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9-10, 17; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1985); *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 423 (1983); *Batterton* v. *Francis*, 432 U.S. 416, 426 (1977).

2. In the district court, appellees contended that Section 602(a)(38) should be construed so as not to require the inclusion in the filing unit of minor siblings who receive child support. Appellees advanced

three arguments to support this contention. The district court correctly rejected each argument.

First, appellees argued (J.S. App. 49a) that a sibling who receives child support is not "deprived of parental support" and hence does not meet the condition described in Section 606(a)(1). That subsection, however, describes inter alia a child who is "deprived of parental support *or care*" by reason of the "continued absence from the home * * * of a parent" (emphasis added). The district court correctly held that a child receiving child support is nevertheless "deprived of parental * * * care" (42 U.S.C. 606(a)(1)) because "he or she is not cared for by his or her absent father" (J.S. App. 49a).

Second, appellees argued (J.S. App. 48a) that a sibling who receives child support is not a "needy child" and hence is not a "dependent child" as defined in Section 606(a). Section 602(a)(38), however, does not mandate that a sibling be included in the filing unit only if he is a "dependent child" as defined in Section 606(a). Instead, Section 602(a)(38) mandates that a sibling be included if he resides with the family and "meets the conditions described in clauses (1) and (2) of section 606(a)." A child's "neediness" is not a condition described in either of those clauses. Rather, the words "needy child" appear only once in Section 606(a), namely, in the Section's preamble, which is anterior to and outside of clauses (1) and (2). See 42 U.S.C. 606(a) ("The term 'dependent child' means a needy child (1) who has been deprived of parental support or care * * * and (2) who is * * * under the age of eighteen * * *."). The district court thus correctly concluded (J.S. App. 49a) that the financial circumstances or "neediness" of an individual child—viewed in isolation—"are no longer determinative of that child's exemption from the

AFDC unit," but are now relevant in determining "the eligibility of his or her mother and half sisters or brothers for AFDC benefits." Accord, *e.g.*, *Gorrie* v. *Bowen*, No. 85-5394 (8th Cir. Jan. 16, 1987), slip op. 8.

Third, appellees argued (J.S. App. 49a) that, even if all co-resident siblings are generally includable in the AFDC filing unit, and even if such siblings' income should generally be considered in making AFDC eligibility determinations, Section 602(a)(38) should be construed to exempt child-support income from this calculus in order to avoid the constitutional problems supposedly generated by a literal construction of the statute. The district court recognized (J.S. App. 50a) that a court "has a duty, when possible, to construe a statute so as to avoid a constitutional question." But the court correctly refused to adopt the construction that appellees proffered, reasoning that to adopt their view would be "to ignore [the statute's] legislative history and to read it to be pointless legislation" (*ibid.*).

To begin with, the statutory language admits of no exception for child-support income. Rather, the statute provides that co-resident siblings shall be included in the filing unit and that "*any income* of or available for such * * * brother[] or sister *shall be included* in making [the AFDC eligibility] determination * * * with respect to the family" (42 U.S.C. (Supp. III) 602(a)(38) (emphasis added)). Where Congress has intended to create an exception for certain types of income, it has done so explicitly. For example, Section 602(a)(24) provides that the income of disabled children receiving SSI benefits is to be excluded in making the AFDC eligibility determination, and the legislative history of the 1984 amendments makes

it clear that Congress intended to preserve this exclusion. See *S. Prt. 98-169*, at 980.

Moreover, as the district court pointed out (J.S. App. 43a-50a), the legislative history plainly shows that Congress intended its filing-unit rule to incorporate no exception for child-support income. The Senate Finance Committee explained that whereas under preexisting law "a family might choose to exclude a child who is receiving * * * child support payments," the amendment "will end the present practice whereby families exclude members with income in order to maximize family benefits." *S. Prt. 98-169*, at 980; accord, *WMCP:98-24*, at 29. On each prior occasion that Congress had considered a filing-unit provision like that eventually enacted in 1984, it was clearly understood that the provision would eliminate the option of excluding child-support recipients from the AFDC filing unit.[8] The 1984 Conference Report

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[8] See, *e.g.*, Staff of Senate Comm. on Finance, 97th Cong., 2d Sess., *CP 97-11, Data and Materials for the Fiscal Year 1983 Finance Committee Report Under the Congressional Budget Act* 41 (Comm. Print 1982) ("Currently an AFDC family may choose to exclude from the AFDC unit any children who have significant income which might reduce the family's AFDC benefit. Most commonly, these are children receiving Social Security or child support income. Under the Administration's proposal, the needs and income of all related children (except SSI disabled children) would be considered in determining AFDC eligibility and benefits payments."); Staff of House Comm. on Ways and Means, 97th Cong., 2d Sess., *WMCP:97-31, Description of the Administration's Legislative Recommendations Under the Jurisdiction of the Committee on Ways and Means* 32-33 (Comm. Print 1982) ("Under the administration's proposal, the needs and income of all related children (except SSI disabled children) would be considered in determining AFDC eligibility and benefits amounts. This would include social security

adopted the Senate version of the amendment (the House bill had no comparable provision), and that report described the amendment as requiring states to include in the AFDC filing unit "the parents and *all* minor siblings living with a dependent child who applies for or receives AFDC." H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. 1407 (1984) (emphasis added). Finally, by expressly establishing a monthly "disregard of $50 of child support received by a family" (*ibid.*), the Conference Report makes it absolutely plain that Congress intended the newly-defined filing unit to include child-support recipients. Accord, *Gorrie* v. *Bowen*, slip op. 11.

In light of the statutory language, the supporting legislative history, and the Secretary's consistent interpretation, it is clear that Congress intended to include all co-resident minor siblings who receive child support in the AFDC family filing unit. The statutory language will not abide appellees' contrary construction. And, for the reasons that we now discuss,

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survivor's benefits and child support payments which are legally paid on behalf of a particular child."); 1 S. Rep. 97-494, 97th Cong., 2d Sess. 47 (1982) ("This change will end the present practice whereby families exclude members with income, such as social security or child support payments, in order to maximize family benefits, and will ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole."); Staff of Senate Comm. on Finance, 98th Cong., 1st Sess., *S. Prt. 98-13, Data and Materials for the Fiscal Year 1984 Finance Committee Report Under the Congressional Budget Act* 50 (Comm. Print 1983); S. Rep. 98-300, 98th Cong., 1st Sess. 165 (1983); Staff of Senate Comm. on Finance, 97th Cong., 2d Sess., *CP 97-15, Background Data and Materials on Fiscal Year 1983 Spending Reduction Proposals Pending Before the Senate Finance Committee* 48-49 (Comm. Print 1982).

the plain-meaning construction of the statute does not pose any constitutional difficulties.

B. The Family Filing-Unit Provision Does Not Take Property In Violation Of The Fifth Amendment

Congress established the standard AFDC filing unit to end "the practice whereby families exclude members with income * * * in order to maximize family benefits" (1 S. Rep. 97-494, *supra*, at 47). The AFDC program provides for a "*family* grant" (*Dandridge* v. *Williams*, 397 U.S. 471, 477 (1970) (emphasis in original)), and Congress acted in 1984 to ensure that such *family* grants are allocated on the basis of aggregate *family* income. In holding that legislative determination to be violative of the Takings Clause, the district court employed an analysis that is incorrect at every turn. The court misperceived both the effect of the challenged government action and the nature of the interests involved.

1. The AFDC family filing-unit provision is grounded on the proposition that "families share their resources" (*Gorrie*, slip. op. 31). The reasonableness of this proposition is confirmed by this Court's decision last Term in *Lyng* v. *Castillo*, No. 85-250 (June 27, 1986), slip op. 5, 7 (holding that "Congress had a rational basis * * * for treating parents, children and siblings who live together as a single 'household' " for food-stamps purposes). Based on this eminently reasonable proposition, Congress determined that the most reliable index of a family's need for financial assistance is the aggregate income of the family members who reside together in the household. By standardizing the AFDC filing unit accordingly, Congress in 1984 merely closed certain benefit-maximizing op-

tions that, in Congress's view, had resulted in an inequitable distribution of welfare grants.

Congress's decision to eliminate a previous benefit-maximizing option for AFDC families no more constitutes a "taking" than would an amendment to the Internal Revenue Code that eliminated a previous deduction, exemption or credit. The only thing that Congress took away from appellees in 1984 was the opportunity to exclude from the filing unit a co-resident family member with separate income, and thereby to have that income ignored in determining the family's AFDC eligibility and benefits. That opportunity, wholly a creature of statute, conferred no property right and was always subject to repeal by Congress. See *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, No. 85-521 (June 19, 1986); *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986).

The district court failed to recognize that the economic sum and substance of the 1984 amendment was a reduction in benefit levels in a social welfare program. See *Gorrie*, slip op. 31 ("the only actual loss from the Secretary's regulation and Section 602(a)(38) to families receiving or applying for AFDC is a reduction in AFDC assistance"). Congress, of course, has "plenary power to define the scope and the duration of the entitlement to [welfare] benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program." *Atkins* v. *Parker*, 472 U.S. 115, 129 (1985). Quite obviously, Congress could have chosen to save the $455 million expected to be saved by the filing-unit provision (*S. Prt. 98-169*, at 980) simply by enacting an across-the-board percentage reduction in all AFDC benefits, or by eliminating the program

entirely. Because there is no constitutionally-protected entitlement to receive a permanently-fixed welfare grant (see, *e.g.*, *Bowen* v. *Owens*, No. 84-1905 (May 19, 1986), slip op. 6), Congress's decision to cut benefits in that way would not have constituted a "taking." As it was, Congress decided to cut AFDC benefits in a more equitable and carefully-tailored way—by reducing benefits most to those families who, by virtue of their members' separate incomes, are relatively speaking least needy. It cannot seriously be contended that this approach effected a "taking" if Congress would have avoided a "taking" by employing a meat-ax instead of a scalpel.

2. In reaching the conclusion that appellees had suffered an unconstitutional "taking," the district court focused, not on the filing-unit provision that Congress enacted in 1984, but on the entirely separate assignment provision that Congress had enacted in 1975. As we have explained (pages 11-15, *supra*), the assignment provision, incorporated in Section 602(a)(26), requires that an applicant for AFDC benefits—typically, the mother—must assign to the state any accrued right to support "in [her] own behalf or in behalf of any other family member for whom [she] is applying" (42 U.S.C. (Supp. III) 602(a)(26)(A)(i)). The statute explicitly states that such an assignment is "a condition of eligibility for aid" (42 U.S.C. (Supp. III) 602(a)(26)).

The district court did not suggest, and it could not credibly be maintained, that this assignment provision effected an unconstitutional "taking" of child-support payments upon its enactment in 1975. The district court recognized that AFDC mothers prior to 1984 had been voluntarily including child-support recipients in the filing unit, and assigning their child support to the state, whenever the mother believed it

financially advantageous to do so. Rather, the court held that the assignment provision effected an unconstitutional "taking" in 1984, when Congress required that AFDC applicants include child-support recipients in the filing unit, and assign their child support to the state, even where the mother believes it financially *disadvantageous* to do so. As noted above (pages 13-15, *supra*), the child support thus assigned to the state is in effect "returned" to the family in the form of AFDC benefits. But the district court theorized that the assignment provision nevertheless has the effect of "taking" the separate income of the child and converting it (via AFDC payments) into a governmental subsidy for the rest of his family. The court characterized this as a taking of the child's private property for public use without just compensation.

The errors in the district court's analysis are so varied and numerous as to defy succinct summary. A catalogue of those errors, any one of which would require reversal of the court's holding on the Takings Clause issue, would include, at least, the following:

a. The premise of the district court's analysis is that North Carolina law affords a child who receives child support the "exclusive use of" and "unrestricted access to" that money (J.S. App. 67a, 69a (emphasis omitted)). As explained more fully by the State of North Carolina in its brief (86-564 Br. 11-14), this premise is incorrect. North Carolina law does provide that "[p]ayments for the support of a minor child shall be ordered to be paid to the person having custody * * * for the benefit of such child." N.C. Gen. Stat. § 50-13.4(d) (1984). But this provision means only that the child's custodian, as trustee, cannot derive personal profit from the child-support

payments; she must use them, rather, for the "benefit" of her child. And as North Carolina points out (86-564 Br. 12), state law allows the mother to exercise "discretion in determining how to utilize child support payments for the 'benefit' of the child." A custodial parent in North Carolina therefore may use child-support payments for the child's shelter, utilities, food, transportation and clothing—items that are ordinarily regarded as shared expenses of subsistence-level families that reside together. The child on whose behalf the support is paid has no state-law right to insist otherwise, nor can he claim such "unrestricted access" to the money as would constrain his mother to spend it exclusively on items that he alone will be permitted to use.

There is thus no basis for the district court's holding that the DEFRA filing unit provision "takes property" from child-support recipients by depriving them of "the right to enforce the fiduciary obligation that prohibited the mother from spending the money on anyone other than the designated child" (J.S. App. 67a). Under North Carolina law, a child-support recipient enjoys no such property right. The premise of the district court's Takings Clause analysis is thus erroneous.[9]

b. In discerning a "taking" of the child-support recipient's property, the district court viewed the assignment provision as mandating an involuntary transfer of funds from the child to the state, with

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[9] Because North Carolina law does not in fact preclude a custodial parent from using child-support payments to discharge essential shared family expenses, the district court's discussion as to whether Congress had "pre-empted" state law by requiring assignment of child support as a condition of the family's AFDC eligibility (J.S. App. 56a-60a, 65a-66a, 69a-70a) is entirely misplaced.

no quid pro quo in return. This mode of viewing the situation is completely misguided. As we have explained (pages 13-15, *supra*), the assignment provision in and of itself works no financial detriment to the AFDC family. That provision creates no substantive distinction between child support and other types of income. It simply establishes a different procedural mechanism—one that benefits the mother by shifting the burden of collection to the state—by which child support is taken into account in determining AFDC eligibility and benefit levels.

For purposes of constitutional inquiry, therefore, the analysis here should be exactly the same as if there were no assignment provision, and if Congress had simply mandated (as it did in 1984) that all co-resident siblings be included in the family filing unit, and that all countable income of such siblings (including child-support income, if any) be considered in determining the family's AFDC status. In that event, the effect of counting child support as "family income" would be to increase the family's income and reduce its AFDC grant, more or less dollar for dollar. It could not seriously be urged that this would effect a "taking" of property, since the government would have taken nothing from the child or from the family, but would simply have reduced its AFDC benefits because of a judgment that the family is less needy. And if there would be no "taking" in that situation, there cannot rationally be thought to be a "taking" when the same economic bottom line is produced by the assignment provision's operation.

The district court at one point suggested (J.S. App. 62a) that it would have found a "taking" even in the absence of the assignment provision, on the theory that mere consideration of child support as "family income" for AFDC purposes requires "the sacrifice of income" on the part of a child who "has

no legal duty to support his or her mother or half-siblings." This reasoning cannot logically be confined to child-support income, but would apply to *any* income received by a minor, whether child support, social security payments, or interest on bank accounts. That line of reasoning, if accepted, would disable Congress from establishing any sort of needs-based eligibility requirements for a family's receipt of public assistance. That plainly is not the law. See, *e.g.*, *Lyng* v. *Castillo*, slip op. 6 & n.7 (citing cases).

c. In discerning a "taking," the district court ignored the fact that participation in the AFDC program is entirely voluntary. That program confers sizable benefits on those who choose to participate, and it is clear that Congress may attach reasonable conditions to participation in such programs. When a person voluntarily complies with such conditions in order to gain access to public benefits that he desires, there is no "taking" of his property. As this Court observed in an analogous context in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1007 (1984): "[A]s long as [the applicant] is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking."

The statutory scheme that is challenged here imposes two relevant conditions on a family's eligibility for AFDC benefits. First, the family must include the parent and all co-resident siblings in the filing unit, and all countable income of such persons must be taken into account in determining the family's need for public assistance. 42 U.S.C. (Supp. III) 602(a)(38). Second, where such income takes the form of child support, the family must assign to the

state any accrued rights to such income. 42 U.S.C. (Supp. III) 602(a)(26)(A). If a family finds either of these conditions offensive, it is free to decline to participate in the AFDC program. If the family chooses to participate, however, it cannot be heard to complain of a "taking," since both of these conditions upon eligibility for AFDC benefits are "rationally related" to the "legitimate Government interest" (*Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1007) of directing limited public welfare funds to those who are most in need.

d. Even if appellees' expectations of a continuing "right" to exclude selected co-resident siblings from the filing unit were thought to be a protected property interest, the operation of the AFDC program would not "take" this property within the meaning of the Fifth Amendment. Although this Court has on many occasions considered whether governmental action constitutes a taking, no simple formula for adjudging such claims has been established. *Connolly*, slip op. 13; *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123-124 (1978). The Court has, however, identified three principal considerations that bear on the question whether governmental action that diminishes property rights amounts to a taking. These considerations are " 'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.' " *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1005 (quoting *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980)).

Here, nothing in "the character of the governmental action" suggests a taking. To the contrary, the courts should be particularly hesitant to find a taking where the challenged governmental action adjusts the distribution of benefits in a social welfare program. The Court has repeatedly recognized that

Congress must retain great flexibility in deciding how finite public funds can best be allocated to provide for the general welfare. See, *e.g.*, *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, slip op. 10. Courts should thus "be extremely reluctant to * * * foreclose[] Congress's exercise of that authority." *Ibid.*; see *Bowen* v. *Owens*, slip op. 5-7. Subjecting legislation affecting public welfare spending to scrutiny under the Takings Clause might preclude Congress from playing its role in "adjusting the benefits and burdens of economic life" (*Penn Central*, 438 U.S. at 124). And it could permit recipients of assistance to fix benefits at their highest historic levels or permanently to preserve every option to maximize benefits.

Second, the "economic impact" of the challenged legislation (*PruneYard Shopping Center*, 447 U.S. at 83) is not so great as to effect a taking. Indeed, as we explained above, the AFDC filing-unit provision "takes" nothing; it simply sets a condition of eligibility in order to effect a more equitable distribution of AFDC benefits. But even if the district court were correct in concluding that the child-support recipient suffers a diminution in the value of his property, the court overstated the child's ability to dictate the use of his support payment and disregarded the numerous countervailing benefits (see pages 38-39, *infra*) that the statutory scheme confers upon the child and his family.[10]

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[10] After weighing the public purposes served by alleged "takings," this Court has sustained government actions that have had a far more severe "economic impact" than those alleged by appellees here. See, *e.g.*, *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962) (ordinance that effectively prohibited continuation of pre-existing business of sand and gravel mining); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 166-168 (1958) (government order prohibiting

Finally, neither the family filing-unit provision nor the assignment provision works any interference with appellees' "reasonable investment-backed expectations" (*PruneYard Shopping Center*, 447 U.S. at 83). Any expectation that appellees may have had that they were entitled to receive AFDC benefits on the same basis and at the same level as before was created as an incident to "the public acts of government" (*Reichelderfer* v. *Quinn*, 287 U.S. 315, 319 (1932)). Appellees thus entertained no more than a "unilateral expectation or an abstract need," a claim that is entitled to no protection under the Fifth Amendment. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980). See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1005-1006.

e. Even if the filing-unit provision were thought to take appellees' property for public use, the district court failed to consider whether the benefits conferred on AFDC families by the statutory scheme amount to "just compensation." If a mother decides to apply for AFDC benefits, that decision confers significant advantages on all members of her family, including any child who may be entitled to support payments. That decision removes from her shoulders and from the shoulders of her child most of the consequences of child-support delinquency.[11] After the

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operation of private gold mines for two years); *Miller* v. *Schoene*, 276 U.S. 272, 279 (1928) (government order to destroy cedar trees that threatened to inflict disease on nearby commercial apple orchard).

[11] As of early 1984, 8.7 million women headed families with minor children whose fathers were not living in the household; of those women who had been awarded child support, 25% received no payments at all, and another 25% received less than the full payments to which they were entitled. Bureau of the Census, U.S. Dep't of Commerce, *Child Support and Alimony: 1983*, at 1 (July 1985).

child-support rights are assigned to the state, the family receives an AFDC grant that reflects the needs of the child regardless of the state's ability to collect from the absent father. Thus, the child's income (and derivatively, the family's) is not subject to wide monthly fluctuations depending on whether support payments are made on time and in full.[12]

The legislative scheme also removes from the AFDC recipient most of the burden of pursuing non-custodial parents who fail to satisfy their support obligations. That task falls to the state (see 42 U.S.C. (Supp. III) 666), which has at its disposal the enhanced enforcement mechanisms enacted by Congress contemporaneously with DEFRA. Child Support Enforcement Amendments of 1984, Pub. L. No. 93-378, 98 Stat. 1305 *et seq.* An additional benefit flowing from the DEFRA amendments is that children newly included in the AFDC filing unit are automatically entitled to receive free medical care under the Medicaid program (see 42 U.S.C. (Supp. III) 1396a(a)(10)(A)(i)(I)). And, as we have noted (pages 14-15, *supra*), Congress attempted to mitigate any economic disadvantage that the new filing-unit rules might work by providing that the first $50 of monthly child support collected by the state is to be paid directly to the child's caretaker relative, which $50 is to be disregarded in determining the family's AFDC eligibility. 42 U.S.C. (Supp. III) 602(a)(8)(A)(vi) and 657(b)(1).

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[12] Only the $50 disregard (see page 14, *supra*) is dependent upon the state's ability to collect from the non-custodial parent. Thus, even in months when the state cannot collect, the family will not fall below the state's maximum payment level for a family of that size and circumstance. And when support payments are timely made to the state by the non-custodial parent, the state will pay the $50 increment to the family on top of its full AFDC grant.

We recognize that it may seem odd to describe the benefits conferred by the AFDC program as "compensation." But it is in our view no less odd to describe the burdens imposed as conditions on participation in the AFDC program as a "taking." And if the seeming incommensurability of the benefits and the burdens makes it difficult to know if the "compensation" is "just," that difficulty suggests not so much an indeterminate conclusion as an erroneous point of departure. The district court's original and basic error was its use of the Takings Clause to resolve disputes about the proper distribution of public welfare benefits.[13]

C. The Family Filing-Unit Provision Does Not Violate The Due Process Clause Or The Equal Protection Component Of The Fifth Amendment

1. *The Statutory Scheme Establishes A Rational Basis For Calculating AFDC Eligibility And Benefits*

It is well settled that social welfare legislation need withstand only a minimal level of scrutiny in order to survive due process and equal protection challenge. See, *e.g.*, *Atkins* v. *Parker*, 472 U.S. 115, 129-130 (1985); *Schweiker* v. *Hogan*, 457 U.S. 569

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[13] Even if the challenged governmental action had constituted a taking without just compensation, appellees would not necessarily be entitled to injunctive relief. See *United States* v. *Riverside Bayview Homes*, slip op. 5-6 (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1016) ("in general '[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking' "). See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 & n.16 (1974); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978).

(1982); *Schweiker* v. *Wilson*, 450 U.S. 221 (1981); *Califano* v. *Jobst*, 434 U.S. 47 (1977); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). Congress has wide latitude in social welfare legislation to "concentrate limited funds where the need is likely to be greatest" (*Califano* v. *Boles*, 443 U.S. 282, 296 (1979)). A classification created by federal legislation will accordingly be upheld so long as there is a rational basis for the congressional choice and the classification is not "patently arbitrary." *Califano* v. *Aznavorian*, 439 U.S. 170 (1978); *Bowen* v. *Owens*, slip op. 5-8; *Flemming* v. *Nestor*, 363 U.S. 603 (1960).

The filing-unit provision that Congress adopted in 1984 is a rational means of carrying out Congress's conclusion that families whose members have access to additional sources of income have less need for government assistance than families without access to such income. That conclusion flowed from Congress's legislative findings that family members who live in the same household pool their resources and share their expenses. As this Court noted last Term in *Lyng* v. *Castillo*, "close relatives sharing a home —almost by definition—tend to purchase and prepare meals together" (slip op. 7). Congress relied here on the same proposition that this Court found rational in *Castillo*: that family members seeking to meet their subsistence needs share expenses and, therefore, at least indirectly, share their respective incomes.[14] Having concluded that all income received by family members residing in the same household should be considered in determining the family's eligibility for AFDC assistance, Congress implemented budget re-

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[14] The validity of this congressional finding is borne out by the record in this case. See, *e.g.*, J.S. App. 75a (quoting Thomas Dep. Tr. 35); Medlin Dep. Tr. 42; Miles Dep. Tr. 19-20; Jeffreys Dep. Tr. 17; Waters Dep. Tr. 29, 32, 41-42.

duction plans that rationally cut benefits most to those who are, because of their additional sources of income, relatively speaking least needy.[15]

In this complex area of social policy, any effort to draw lines among the needy is difficult and is inevitably subject to criticism by some. Wherever the line is drawn, those who narrowly fail to qualify, or those who find their benefits marginally reduced, remain "needy" by comparison with more affluent members of our society. Cf. *Schweiker* v. *Hogan*, 457 U.S. at 589-592; *Lyng* v. *Castillo*, slip op. 2. But it is by no means clear that the allocation of public benefits that appellees prefer would be any more just or equitable than the allocation that Congress chose in 1984. On appellees' view, for example, the AFDC program should treat a family of three with no monthly income as being identical to a family of six with $600 of monthly income, provided that the $600 takes the form of child support. A moral philosopher might well ask why those two families should receive the same level of public assistance, despite the fact that the latter has $600 more than the former with which to buy clothes, pay rent, and purchase groceries. As this example shows, the benefits system that would exist under the decision below would not eliminate harsh consequences. It would simply shift the place at which the line is drawn.

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[15] AFDC is only one of many programs, at the federal and state levels, that provide assistance to the impoverished. The record in this case shows that appellees, in addition to their AFDC grants, obtained assistance under various other programs. See, *e.g.*, Thomas Dep. Tr. 10-15 (food stamps, Medicaid, energy assistance, rent assistance); Jeffreys Dep. Tr. 9, 11-12 (Medicaid, food stamps); Miles Dep. Tr. 9, 14-15 (food stamps); Waters Dep. Tr. 9, 13, 17-18, 27, 35, 41, 44 (Pell grant, energy assistance, subsidized housing, day care services, food stamps, W.I.C. program).

2. *The Family Filing-Unit Provision Does Not Burden Fundamental Rights*

The district court refused to apply the "rational basis" test that this Court has repeatedly used in considering constitutional challenges to federal welfare legislation.[16] Instead, the court below subjected the statute to "more rigorous" scrutiny because of a supposition that the statute burdens the "fundamental associational rights" of child-support recipients

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[16] See, *e.g.*, *Lyng* v. *Castillo*, *supra* (rejecting an equal protection challenge to statutory distinction in the Food Stamps Program between parents, children and siblings who live together and more distant relatives or groups of unrelated persons who live together); *Bowen* v. *Owens*, *supra* (rejecting an equal protection challenge to distinction in the Social Security Act between remarried widowed spouses and divorced widowed spouses); *Schweiker* v. *Hogan*, 457 U.S. 569, 588-593 (1982) (rejecting an equal protection challenge to federal limitations that result in higher Medicaid benefits to recipients of Supplemental Security Income (SSI) than to persons who are self-supporting); *Schweiker* v. *Wilson*, 450 U.S. at 230-239 (rejecting an equal protection challenge to federal limitations on payment of SSI benefits to certain inmates of public institutions); *Califano* v. *Aznavorian*, 439 U.S. 170, 174-178 (1978) (rejecting an equal protection challenge to federal limitations on payment of SSI benefits to persons who reside outside the United States for a period greater than 30 days); *Mathews* v. *De Castro*, 429 U.S. 181 (1976) (rejecting an equal protection challenge to a federal limitation on payment of Social Security benefits to the divorced wives of retirees); *Mathews* v. *Lucas*, 427 U.S. 495, 503-516 (1976) (rejecting an equal protection challenge to a federal limitation on payment of Social Security benefits to surviving illegitimate children who are unable to establish dependency on the putative parent); *Weinberger* v. *Salfi*, 422 U.S. 749, 767-785 (1975) (rejecting constitutional challenge to provisions of the Social Security Act that imposed a nine-month duration-of-relationship requirement for survivor's benefits).

(J.S. App. 73a). As this Court has recently held, however, a statutory classification does not "burden a fundamental right" unless it " 'directly and substantially' interfere[s] with family living arrangements." *Lyng* v. *Castillo*, slip op. 3 (quoting *Zablocki* v. *Redhail*, 434 U.S. 374, 386-387 & n.12 (1978)).

The AFDC family filing-unit provision, like the statutory definition of "household" in *Lyng* v. *Castillo*, does not directly and substantially interfere with a family's decision about its living arrangements.[17] Just as the Food Stamp provision at issue in *Castillo* did not "order or prevent any group of persons from dining together" (slip op. 4), the AFDC filing-unit provision does not prevent any group of persons from living together. Indeed, it does not even prevent a group of persons from living together and collecting AFDC benefits. Cf. *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 529 (1973). The statute simply requires that family members who choose to live together, and who choose to apply for AFDC benefits, must apply for those benefits as a unified family filing unit. While this statutory modification will result in reduced AFDC benefits for some families, and while some families may conceivably find other living arrangements—

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[17] In denying the government's motion for reconsideration, the district court sought to distinguish this case from *Lyng* v. *Castillo*. It stated (J.S. App. 108a-109a) that the present case "bear[s] a greater resemblance to *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) than to *Lyng* because the family filing-unit provision renders an entire family ineligible for needed benefits." Even if the court's description of the DEFRA filing-unit provision were accurate, which it is not, *Moreno* does not support the application of "heightened scrutiny" here. Both *Moreno* and *Lyng* were decided under the "rational basis" standard, as the Court in the latter decision emphasized. See *Lyng* v. *Castillo*, slip op. 4 (quoting *Moreno*, 413 U.S. at 533).

such as a child's possible decision to live with her father rather than to live with her mother and receive child support (J.S. App. 78a)—economically more advantageous as a result, those consequences are the consequences that flow from any reduction in benefit levels and they do not constitute an impairment of fundamental family rights. See *Califano* v. *Jobst*, 434 U.S. at 58 (Social Security provisions terminating a child's support upon marriage do not violate equal protection principles even though they "may have an impact on [the child's] desire to marry, and may make some suitors less welcome than others").[18]

Relying on largely anecdotal evidence of hardships faced by certain AFDC families, the district court held that the DEFRA filing-unit provision is unconstitutional on its face. But this Court has cautioned that "the validity of a broad legislative classification is not properly judged by focusing solely on the portion of the disfavored class that is affected the most harshly by its terms." *Schweiker* v. *Hogan*, 457 U.S. 569, 589 (1982). Congress based the DEFRA amend-

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[18] For the reasons set forth in the text, "heightened scrutiny" cannot be justified here on the theory that the AFDC filing-unit provision burdens "fundamental family rights." For the reasons set forth in *Lyng* v. *Castillo*, moreover, heightened scrutiny likewise cannot be justified here on the theory that the AFDC filing-unit provision creates a "suspect" or "quasi-suspect" classification. Family members are not a "suspect class." Families that receive child support are treated no worse for AFDC purposes—in fact, they are treated better (see pages 11-12, 39 & n.12, *supra*)—than families that receive other types of countable income. And, finally, child-support recipients who live with needy families are not situated similarly to child-support recipients who live in other circumstances. *Baldwin* v. *Ledbetter*, 647 F. Supp. at 636; see *Gorrie*, slip op. 27, 29-30; *Hogan*, 457 U.S. at 590.

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ment on an unremarkable observation drawn from human experience, an observation borne out by the record in this case (see note 14, *supra*), that family members who reside in the same household, family members who are bound together by close and lasting emotional ties, are likely to share their resources and responsibilities. Although appellees apparently would prefer that Congress allocate public benefits on the basis of inquiries into each particular family's spending habits and individualized needs, "[s]uch a system is neither feasible nor constitutionally mandated." *Brown* v. *Heckler*, 589 F. Supp. 985, 995 (E.D. Pa. 1984). See *Lyng* v. *Castillo*, slip op. 5-6 (footnotes omitted) ("the cost-ineffectiveness of case-by-case verification of claims that individuals ate as separate households unquestionably warrants the use of general definitions in this area"); *Bowen* v. *Owens*, slip op. 6 (original quotation marks omitted) ("[i]n determining who is eligible for such benefits, the scope of the program does not allow for individualized proof on a case-by-case basis"); *Califano* v. *Jobst*, 434 U.S. at 53 ("[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases"); *Dandridge* v. *Williams*, 397 U.S. at 485 (quoting *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70 (1913)) (" 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' ").

Ultimately, the district court's criticism of the family filing-unit provision is premised on its belief that the mechanism chosen by Congress will not achieve its goals (see J.S. App. 85a). The Constitution, however, empowers Congress, not the courts, to make "democratic choices among alternative solutions to

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social and economic problems" (*Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981)). As in the case of any statutory provision, there might be room to debate the wisdom of Congress's choice. But "[g]overnmental decisions to spend money to improve the general public welfare in one way and not another 'are not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" *Mathews* v. *De Castro*, 429 U.S. 181, 185 (1976) (quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937)).

CONCLUSION

The judgment of the district court should be reversed and the case remanded with instructions to vacate the injunction and to dismiss the complaint and the third-party complaint.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

WILLIAM KANTER
CARLENE V. MCINTYRE
Attorneys

RONALD E. ROBERTSON
General Counsel
Department of Health and Human Services

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

v.

BEATY MAE GILLIARD, *et al.*,

Appellees.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, *et al.*,

Appellants,

v.

BEATY MAE GILLIARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLEES

JULIUS LEVONNE CHAMBERS
ERIC SCHNAPPER
NAACP Legal Defense & Educational Fund
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

JEAN M. CARY
Thompson and McAllaster
327 West Main Street
Durham, North Carolina 27701
(919) 688-9646

JANE R. WETTACH*
East Central Community Legal Services
Suite 600
5 West Hargett Street
Raleigh, North Carolina 27601
(919) 828-4647

LUCIE E. WHITE
U.C.L.A. Law School
405 Hilgard Avenue
Los Angeles, California 90024
(213) 206-1075

Counsel for Appellees

*Counsel of Record

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 602(a)(38) authorize state officials to require non-needy children to become welfare recipients and to forfeit their child support in order for their custodial parents and indigent siblings to receive Aid to Families with Dependent Children?
2. If 42 U.S.C. § 602(a)(38) does authorize such action on the part of the state officials, is such a procedure unconstitutional?
3. Where state officials knowingly and deliberately violate a valid federal injunction, does the Eleventh Amendment preclude the federal courts from ordering state officials to return funds improperly taken or

withheld in violation of that injunction?

4. Should Hans v. Louisiana, 134 U.S. 1 (1890), be overruled?

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STATEMENT OF THE CASE

This case originated in 1970 as a challenge to a North Carolina practice of improperly imputing income to recipients of Aid to Families with Dependent Children (AFDC). At the time, North Carolina automatically included all children living in a household as members of an AFDC assistance unit if an application was made for any of the children. This was true even when a particular child received adequate child support from his absent parent. The whole family's grant was reduced by the child support belonging to just one family member. A three-judge court held that to treat child support paid for a specific child as a resource available to the entire family worked an unlawful appropriation of the funds of the supporting parent and the recipient child, in violation of the intent of the

Social Security Act and constitutional principles. Gilliard v. Craig, 331 F. Supp. 587, 593 (W.D.N.C. 1971). A permanent injunction was entered, prohibiting North Carolina from directly or indirectly reducing AFDC payments to eligible children by the amount of legally-restricted child support income received by other children in the household. North Carolina Jurisdictional Statement. A-108 to A-114, (hereinafter N.C.J.S.). This Court affirmed that order. 409 U.S. 807 (1972).

In July, 1984, Congress enacted the Deficit Reduction Act of 1984 (DEFRA), which contained an amendment to the Social Security Act regarding the treatment of AFDC recipients who shared a home with siblings not receiving AFDC. Pub. L. No. 98-369, § 2640(a), 98 Stat. 1145, 42 U.S.C. (Supp. III) § 602(a)(38). The Department of Health and Human

Services interpreted section 602(a)(38) to require termination of AFDC to such recipients unless these non-recipient siblings were also added to the welfare rolls. 45 C.F.R. §206.10(a)(1)(vii). Once drawn into AFDC, their separate income was counted as available to the whole group and any child support payments were required to be assigned to the state. 45 C.F.R. § 232.11. North Carolina officials, although aware that this interpretation of section 602(a)(38) conflicted with their obligations under the 1971 injunction, did not return to court to seek a modification of that order. (N.C.J.S. A-78). Instead, in October, 1984, the state officials began systematically to violate the 1971 decree.

In May, 1985, a group of class members injured by that violation submitted to the district court a request

for further relief. (J.App. 30-34). North Carolina then filed a third-party complaint against Secretary Bowen, claiming that the state's actions were required by the new HHS regulations. (J.App. 66-72). The district court upheld the disputed HHS regulations as consistent with section 602(a)(38), but held the statute and regulation unconstitutional as applied to child support recipients, and enjoined their enforcement. (N.C.J.S. A-1 to A-80). The district court also concluded that North Carolina officials had knowingly violated the outstanding 1971 injunction, and directed those officials to return all funds seized or withheld in violation of that earlier decree. (N.C.J.S. A-78 to A-80). The district court stayed its order pending appeal. (N.C.J.S. A-148). Both the federal and state defendants

appealed; on December 8, 1986, this Court noted probable jurisdiction.

STATEMENT OF THE FACTS

In October, 1984, North Carolina notified all AFDC recipients who lived with non-AFDC siblings that their AFDC grants would be terminated unless they reapplied for AFDC and agreed to put those siblings on public assistance. Prior to that date, for example, Dianne Thomas and her daugher Crystal had been receiving a monthly AFDC grant of $194 because Crystal's father paid no child support. Ms. Thomas had not requested assistance for her son Sherrod, however, because he was adequately supported by a $200 monthly support payment from Sherrod's father. Ms. Thomas was told that she could not receive AFDC for herself and Crystal unless Sherrod also went on welfare. (N.C.J.S. A-14). When Ms. Thomas and other AFDC parents

submitted the required application, they were also told that all aid would be denied unless they assigned to the state the support payment of the non-indigent child. (N.C.J.S. A-16). The state retained most of each support payment, providing the applicants with a small additional grant for the non-indigent applicant, plus in most instances a statutory $50 pass through.[1] The actual additional grant for a child such as Sherrod Thomas was $29 (Table 4 J. App. 52).

The appellants' practice of mandating participation in AFDC by non-needy siblings had two immediate consequences. First, approximately 15%

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[1] 42 U.S.C. § 657(b)(1) requires the child support enforcement agency to pass through to the family the first $50 paid in child support in a particular month. 42 U.S.C. § 602(a)(8)(A)(vi) requires the AFDC program to disregard this $50 in calculating the family's income.

of the affected AFDC recipients were terminated from the North Carolina AFDC program from 1984 through 1986 because state officials calculated that the support payments to their siblings were sufficient to support the entire family. Second, in about 85% of the cases a child with independent support was conscripted onto the rolls and his child support was taken by the state. See lists of Class Members filed Dec. 11, 1986, J. App. 16. State officials then disbursed for that child an additional AFDC allotment which was substantially less than the amount the state had actually received. Prior to October, 1984, for example, Diane Jefferys was receiving $204 a month in child support for two of her children, Latoya and Anthony, who were not on AFDC; after Ms. Jefferys complied with the state's direction to put both children on AFDC, the state received the $204 each

month, but disbursed for the children only an additional $71. After passing through the $50 disregard, the state retained the balance of $83 to help defray the overall cost of the AFDC program. (N.C.J.S. A-29). Similarly, in August, 1985, North Carolina received a check for $810 to cover several months of accumulated support payments for two children of Arvis Waters; state officials actually disbursed to Ms. Waters only $50 of that amount, and retained the remaining $760. (N.C.J.S. A-27)

This practice of expropriating most of the child support payments involved several direct and foreseeable consequences. First, of course, it drastically lowered the standard of living of the supported children whose support payments were partially expropriated by the state. The money available for Latoya and Anthony

Jefferys, for example, immediately fell by more than half. Ms. Jefferys and her children were soon evicted from their house, and Ms. Jefferys was unable to buy either clothes or shoes for children who had had both prior to 1984. (J. App. 134-135). Other supported children suffered in a similar manner because the state was seizing a substantial portion of their support funds. (N.C.J.S. A-13 to A-30). The state retains on average $50 to $100 from each monthly child support payment, one third tc one half of each such payment.[2] Having been thus conscripted onto the AFDC rolls, the

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[2] See N.C.J.S. A-14 (monthly support payment of $200; net additional allotment of $29 plus $50 pass-through); A-21 to A-22 (monthly support payment of $189; net additional allotment of $44 plus $50 pass-through; A-23 to A-24 (monthly support payment of $190; net additional allotment of $44); A-28 to A-29 (monthly support payment of $204; net additional allotment of $36 plus $50 pass-through); cf. J. App. 109 (average "reduction" of $103).

formerly self-sufficient children were forced to subsist on grants equal to about 30% of the federal poverty level.[3]

Second, once the fathers of the supported children learned that most of the support payments were actually going to the Department of Human Resources, rather than to their own children, many of them terminated or reduced those payments. The father of Latoya and Anthony Jefferys stopped making support payments several months after the assignment began, because, Ms. Jefferys reported, "he feels like when he pays, his children do not really benefit." (N.C.J.S. A-29). State officials were evidently unable to bring about a resumption of those support payments. The father of Sherrod Thomas had

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[3] Compare table 4, J.App. 52 (North Carolina payment standard) with 50 Fed. Reg. 9517-18 (March 8, 1985) (federal poverty guidelines).

regularly and voluntarily been paying $200 a month for the child's support, but ceased making those payments as soon as they were assigned to the state; subsequently state officials were able to induce the father to resume support payments, payable to the state, of $87 a month. (N.C.J.S. A-16 to A-17; see also id. at A-20, A-68 to A-73).

A state judge explained that as a practical matter North Carolina courts have few effective tools for compelling an unwilling father to make support payments, since garnishment of a father's wages frequently results in his dismissal, and imprisonment "rarely results in income for the family." (N.C.J.S. A-53). Cf. Linda R.S. v. Richard D., 410 U.S. 614 (1973). Prior to 1984, the most effective judicial tool for inducing fathers to make support payments was emphasizing the importance

of keeping the child at issue off the public assistance rolls. (N.C.J.S. A-72 to A-73). The judge explained that she expected "to continue hearing father's refusals to pay child support when they learn that their child support is being paid to the Department of Human Resources instead of to their children, and when they discover that their child is on welfare even though they are paying support regularly." (N.C.J.S. A-72).[4]

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[4] The district court in Johnson v. Cohen, No. 84-6277 (E.D. Pa. Jan. 10, 1986), appeal pending, No. 86-1101 (3d Cir.) found the disputed practices,

> reduce the incentive a father might have to provide child support willingly. The sibling deeming rules will increase the unwillingness of fathers to pay child support because payments by the father will not have demonstrable benefits to the child, and because the child support payments will be subsidizing other members of the household. The sibling deeming rules will result in increased resistance to paying child support.

Third, the disputed practices poisoned in a variety of ways relations among the family members involved. Non-custodial fathers ready and willing to support their children were predictably angered to learn that they were effectively forbidden to do so because the mother, having had one or more children by another less responsible man, was seeking AFDC for those other children. (N.C.J.S. A-14, A-71). Because the mandatory assignment terminated the normal support relationships between the non-custodial parent and the child, some of those parents reduced or ended their non-financial relationship with the children, in turn inducing emotional problems among the children. (N.C.J.S. A-17). Some custodial parents have surrendered custody of supported children in order to avoid seizure of the children's support

funds. (N.C.J.S. A-19).

Finally, the state officials have moved aggressively to prevent non-custodial parents from providing in-kind support which the state cannot effectively seize and profit from. After the birth of his son Jermaine, for example, James Richardson regularly provided the child with food, clothing and diapers, and paid directly some of the related household bills. When Richardson refused to agree instead to pay the state $165 a month, of which only $50 would go to Jermaine, he was prosecuted for criminal non-support. (N.C.J.S. A-20). Similarly, Rick Staples was directly providing to his child Kristen clothing, food, furniture, medicine and other needed items. After Kristen's child support rights were assigned by the child's mother as a condition of her receipt of AFDC for two

other children, state officials brought a civil action against Staples to enjoin him from continuing to provide such in-kind assistance to his daughter. The Wake County district court judge found that it would not be in Kristen's best interest for the father to pay monetary support rather than purchase necessities directly and denied the agency's complaint. Wake County, ex rel. Carol Fleming v. Rick Staples, 86 CVD 4461 (Wake County) (Oct. 1, 1986) appeal dismissed, 86 10DC1351 (N.C.Ct. App., Feb. 2, 1987).

SUMMARY OF ARGUMENT

(1) Section 602(a)(38), as the government construes it, requires as a condition of ADFC eligibility that an applicant's non-needy siblings also go on welfare, and forfeit to the state any child support payments. The actual language of section 602(a)(38), however,

makes no reference to requiring anyone to actually apply for or receive public assistance. Rather, the statute simply mandates that an adjustment be made in "the determination" of the size of the grant to those individuals who actually desire AFDC assistance.

The history of the statute does not contain, as the Solicitor suggests, "legislative findings that family members who live in the same household pool their resources." (U.S. Br. 41). Section 602(a)(38), unlike the statute in Lyng v. Castillo, 91 L.Ed.2d 527 (1986), was not preceded by or based on any congressional hearings regarding the actual practices of AFDC recipients. The legislative history of section 602(a)(38) suggests, at most, that Congress intended to require the states to "take into consideration" the extent to which the income of non-AFDC children was in fact

reducing the net needs of AFDC recipients with whom they lived.

The HHS regulations effectively strip state judges of the power to direct a child support payment to a specific child if he or she resides in a household with AFDC recipients. The regulations have the practical effect of converting any such state decree into an award to the entire family, despite the intent of the state court and despite the fact that state law does not permit child support funds to be used for others in the household. Neither the language nor the legislative history of section 602(a)(38) indicate an intent to pre-empt state domestic relations law in this way.

(2) This is not, as was true in Lyng, simply a case in which aid recipients are complaining that the amount of their benefits has been reduced. Indeed, in most instances, the

HHS regulations actually result in a small increase in the AFDC grant. The issue here, rather, is whether the HHS regulations attach an unconstitutional condition to the receipt of that aid. Cf. Hobbie v. Unemployment Appeals Commission, (No. 85-993, Feb. 25, 1987). In this case a custodial parent seeking AFDC is required to turn over to the state the child support payments for her non-needy children, even though those children neither want nor need AFDC. North Carolina turns a substantial net profit by thus conscripting supported children into AFDC, paying out in additional benefits for those children several million dollars less than the total amount of support funds which the state receives for them.

The government's practices constitute a taking of private property without just compensation. The child

support payments diverted to and retained by the state are undeniably the private property of the supported child. In diverting those funds to the government rather than spending them on the designated child, the mother acts at the behest and on behalf of the state. The consequences of a loss of AFDC to her other children are so catastrophic that the mother has no choice but to act as an agent of the state and make the demanded assignment; the child on whom the funds should have been spent literally has no choice in the matter.

The Solicitor argues that the amount of each child's support funds thus expropriated is "not so great as to effect a taking." (U.S.Br. 37). But the amount of money taken is of enormous importance to the comparatively poor individuals affected. The government asserts that no taking has occurred

because the incremental grant paid for each affected child, although less than the amount seized, nonetheless "reflects the needs of the child." (U.S.Br. 39). The Taking Clause, however, does not permit the government to take from each according to his ability, merely because it purports to provide to each according to his needs.

(3) The actions of the state appellants violated a 1971 injunction which had been affirmed by this Court. Craig v. Gilliard, 409 U.S. 807 (1972). The district court concluded that the state officials knew that their conduct was forbidden by the terms of the 1971 order. (N.C.J.S. A-78, A-79).

The state appellants argue that the 1984 adoption of section 602(a)(38) removed the legal basis on which the 1971 injunction rested. These appellants now assert that the 1971 opinion relied

solely on the Social Security Act as it was then written; in their 1972 appeal to this Court, however, the state appellants insisted that the 1971 opinion rested on constitutional grounds. If the state officials believed that the enactment of section 602(a)(38) did undercut the basis of the 1971 injunction, they were obligated to obey that injunction until it was modified by the court. Walker v. City of Birmingham, 388 U.S. 307 (1967).

The state appellants assert that, even if they knowingly violated the 1971 injunction, the Eleventh Amendment precludes the district court from directing a refund of money seized or withheld in violation of that decree. "Federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." Hutto v. Finney, 437 U.S. 678 (1978).

The remedial order of the district court simply enforces the prospective 1971 injunction by requiring state officials to do today what the 1971 injunction required to be done in 1984-86.

I. THE APPELLANTS' PRACTICES ARE FORBIDDEN BY THE SOCIAL SECURITY ACT

Congress enacted section 602(a)(38) to require that where a parent and child receiving AFDC live together with a child receiving income such as child support payments, the AFDC grant to the parent and indigent child would be adjusted to take into account the economic benefits which those AFDC recipients receive as a result of the presence of that non-AFDC child. The statutory issue presented by this case concerns the nature of the adjustment which is authorized by section 602(a)(38). The actual language of section 602(a)(38), like much of the Social Security Act, is "almost unintelligible to the uninitiated."

Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981). To understand the meaning of that section, it is necessary to begin with the statutory scheme onto which it was engrafted, and the state of the law prior to 1984.

(1) The states participating in the AFDC program are given discretion in determining the size of the grants they will make, subject to certain limitations embodied in the Social Security Act and the applicable regulations.

Generally, a state must begin with a "standard of need."[5] This is the amount which the state determines is necessary to meet essential needs; the level generally varies with the number of individuals in the household, on the theory that those who are part of the

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[5] The state standard of need is referred to in several parts of the statute. See 42 U.S.C. §§ 602(a)(17), 602(a)(18), 602(a)(23), 602(a)(31).

same household experience certain economy of scale savings. Cf. Lyng v. Castillo, 91 L.Ed.2d 534-35. A state cannot alter its standard of need merely to lower the benefit to be paid; the state may choose to make actual grants too small to meet the standard of need, but it cannot achieve or obscure that result by doctoring the standard of need itself. Cf. Rosado v. Wyman, 397 U.S. 397, 413-14 (1970).

Second, a state computes the countable income of each applicant. This computation is subject to the "actual availability principle," which precludes a state "from relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need." Heckler v. Turner, 84 L.Ed.2d 138, 150 (1985). The most important application of this principle is to bar states from reducing or denying benefits

on the theory that an applicant is receiving presumed but non-existent income from another person in the household. King v. Smith, 392 U.S. 309 (1968); Van Lare v. Hurley, 421 U.S. 338 (1975). In some instances, however, Congress has created an express exception to the principle, permitting a state to "deem" available to an AFDC applicant a specified portion of the income of another party, regardless of whether it is in fact received. The amount "deemed" available is determined by subtracting from the third party's income that party's own standard of need, and making certain other adjustments. 42 U.S.C. § 602(a)(39) (grandparents), § 602(a)(31) (stepparents); § 615 (alien sponsors). Cf. Schweiker v. Gray Panthers, 453 U.S. 34 (1981) (spouses).

Third, having computed a countable income for the applicants, the state

calculates the grant amount. The Social Security Act does not mandate a particular method of calculation. Jefferson v. Hackney, 406 U.S. 535 (1972). For example, the state may pay a specified percentage of the difference between the countable income and the applicants' needs. Rosado v.Wyman, 397 U.S. at 409 and n. 13. Alternately, the state might choose to set a maximum on the size of the grant, regardless of the applicants' needs. Dandridge v. Williams, 397 U.S. 471 (1970). Or, like North Carolina, a state may apply a percentage reduction to the standard of need, and then subtract countable income from that figure. (J. App. 77-78).

Prior to 1984, states participating in the AFDC program did not as a general practice take into consideration how the need and income of an applicant might be affected by the presence in the home of a

child who was not seeking AFDC because he or she had a separate source of income such as child support. Section 602(a)(38) was enacted to require the states to make an adjustment in their AFDC grants because of the presence of such children; what that adjustment was to be remains in dispute.

(2) Section 602(a)(7) provides that, "in determining [the] need" of an AFDC applicant, a state "shall take into consideration any ... income" of the applicant or certain other individuals. Section 602(a)(38) states in pertinent part that

> in making the determination under paragraph (7) with respect to a dependent child ... the State agency shall ... include
>
> * * *
>
> (B) any brother or sister of such child ... if such ... brother, or sister is living in the same home as the dependent child, and any income of or available for such ... brother,

> or sister shall be included in making such determination ....

Section 602(a)(7) and 602(a)(38), read together, require that, in determining the need of the parent and indigent child or children applying for AFDC, the state will "include" any children who may not be seeking AFDC, and "take into consideration" the income of those children. Section 602(a)(38) clearly requires that some sort of adjustment be made in an AFDC grant when there are supported children in a household, but the statutory language itself provides little guidance as to what that adjustment is to be.

Here, as has occurred before in other contexts, section 602(a)(38) was framed in the sort of opaque language that so often facilitates the legislative process but complicates the work of the judicial branch. Although the vague language of section 602(a)(38) is

susceptible of several quite different interpretations, each of those alternatives is itself quite simple. Either the Administration, which originally proposed this amendment, or the Senate Finance Committee, which first approved it, could readily have framed a statute or explanation free of ambiguity, but they chose not to do so. In the face of this studied opacity one cannot assume that the framers of section 602(a)(38) intended to reject any of the benefit adjustment methods set forth with greater specificity in other parts of the Social Security Act; the only thing which the framers of section 602(a)(38) clearly rejected was clarity itself.

(3) The Solicitor General argues, however, that the purpose of section 602(a)(38) was not to alter the method of calculating the grants for individuals who actually wanted AFDC assistance.

Rather, he asserts, Congress enacted section 602(a)(38) to require, as a condition of AFDC assistance to a needy child, that all the child's siblings be put on AFDC, including children who neither wanted nor needed government aid, and that all the child support payments of those conscripted siblings be assigned to the government. The effect of the HHS regulations implementing this view has been to add several hundred thousand unwilling participants to the AFDC rolls.

The language of section 602(a)(38) is difficult to reconcile with the Solicitor's proposed interpretation. Section 602(a)(38) contains no language suggesting that supported children or anyone else must apply for AFDC, or live on welfare rather than rely on support from a non-custodial parent. Indeed, section 602(a)(38), unlike other

provisions of the statute,[6] does not impose any obligations at all on AFDC applicants themselves; the commands of section 602(a)(38) are directed solely at the state AFDC officials calculating the size of the grant to be awarded to actual applicants. Section 602(a)(26), which requires the assignment of child support funds, is expressly applicable only to an "applicant or recipient;" a member of Congress familiar with section 602(a)(26) would have had no reason to think that 602(a)(38) would extend that mandatory assignment provision to children who neither wanted nor needed AFDC.

If Congress had intended actually to

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[6] See, e.g., 42 U.S.C. §§ 602(a)(14) (recipients required to submit reports), 602(a)(19)(A) (certain recipients required to register for employment-related activities); 602(a)(26)(B) (recipients required to assist state in establishing paternity of children born out of wedlock), 602(a)(35) (state may require recipients to look for work).

require that supported children go on the AFDC rolls, it certainly knew how to do so. The Food Stamp Amendments of 1982, enacted the same year that section 602(a)(38) was first proposed, expressly contained just such a requirement. The Food Stamp Program provides funds, not to individuals, but to "households" whose composition is specified by statute. An application must be made on behalf of a "household;" thereafter it is the statutorily defined "household" whose needs and income are considered, and to whom the foods stamps are allotted. 7 U.S.C. §§ 2013 et seq. In 1982, when Congress redefined the Food Stamp household to encompass siblings, that statutory change clearly mandated that such siblings apply for and comply with the provisions of the Food Stamp program. Cf. Lyng v. Castillo, 91 L.Ed.2d at 532 n. 1. AFDC, on the other hand, remains

as it was prior to 1984 a statutory scheme which focuses on individuals. Requests for AFDC are made, not by a statutorily defined entity, such as a "household," but by "individuals wishing to make application for aid." Compare 7 U.S.C. § 2020(e)(2) with 42 U.S.C. § 602(a)(10)(A). Thus the 1984 AFDC legislation clearly did not compel participation in that program by individuals who did not wish such assistance.

The legislative history of section 602(a)(38) provides no support for the government's interpretation of the statute. The Solicitor does not suggest that any member of Congress ever actually said that additional children would be required to go on AFDC, or that support payments for children who did not want AFDC would be assigned to the government. For years critics of AFDC had argued that

the very status of being on welfare had a debilitating effect on the morale and aspirations of children; surely one of these critics would have spoken out if it were understood that section 602(a)(38) would require placing on the welfare rolls several hundred thousand children who were then being supported directly by their own parents. At the time when DEFRA was adopted, the overriding issue dividing Congress was whether the deficit should be cut through reductions in spending or increases in taxes. Section 602(a)(38) as the Solicitor construes it, was intended literally to take $150 million a year from fathers and children not then on AFDC, and funnel it back through the states to the federal government. Had it been generally understood that this was to be the effect of section 602(a)(38), it seems likely that someone would have objected that it

had all the trappings of an extraordinarily retrogressive tax.

The Solicitor bases his statutory argument on an assertion that there were "legislative findings that family members who live in the same household pool their resources" (U.S. Br. 41), but this enticing assertion is not accompanied by any reference to the phrase "pool their resources" in the legislative history. Elsewhere in his brief the Solicitor describes these purported findings in very different terms, suggesting variously, that Congress found that such indigent families "share":

- "the expense of common necessities" (U.S. Br. 20)
- "the cost of obtaining life's necessities" (U.S. Br. 21)
- "expenses" (U.S. Br. 10, 41)
- "resources" (U.S. Br. 29, 41)
- "income" (U.S. Br. 10, 41)

These quite different "findings" would

support very different interpretations of the statute. If Congress acted on a finding that such families share the "expense of common necessities," such as rent and utilities, it presumably contemplated only an economy of scale adjustment based on the lower per capita cost of those common needs. Attempting to escape the palpable distinction between the sharing of certain common expenses and a pooling of all income, the Solicitor asserts that not only shelter and utilities, but also "transportation and clothing ... are ordinarily regarded as shared expenses." (U.S. Br. 33). If a mother were to spend $10 on diapers for an infant son, a dress for a young daughter, or a blouse for herself, it would be strange indeed to describe that expenditure as meeting a "shared expense" of all three. Similarly, for the majority of AFDC recipients who travel on

public transportation, the fares involved, unlike the cars of more affluent families, are not a shared expense.

(4) The Solicitor General urges the Court to apply to the disputed HHS regulations the deference usually accorded an agency responsible for administering a statute. (U.S. Br. 24). That deference is appropriate in the ordinary case in which the agency at issue not only has relevant technical expertise, but also agrees with the purposes and priorities that prompted Congress to enact the underlying statute. But there are some instances in which such agreement does not in fact exist. The very independence of the executive and legislative branches guarantees that there will be important, deeply felt differences regarding federal policies; such differences will inevitably mean

that Congress will at times adopt legislation opposed by executive officials, or will reject in whole or part administration legislative initiatives. The courts, in determining the significance of an agency's interpretation of a statute, must as a general rule bear in mind the possible existence of such differences.

Caution is particularly appropriate in construing legislation framed by the executive branch and enacted by a reluctant Congress. Such legislation necessarily represents a compromise of the differing policies and priorities which animate the two branches of government involved. Because of those differences, such a statute, like a contract drafted by one of two parties with adversarial interests, must be construed to embody only those concessions to administration policy

which Congress would clearly have understood it was making. It is vital to the integrity of the legislative process that executive agencies not be permitted to give to a statute, after enactment, an interpretation more favorable to the administration's perspective than the construction clearly offered by the agency when the legislation was still before Congress.

During the years immediately preceding the enactment of DEFRA, the most consistent and heated differences between Congress and the executive branch concerned the level of benefits to be provided to the indigent under various social welfare programs. The administration strongly favored reducing the deficit by cutting such social welfare spending, while Congress often objected to placing the burden of deficit reduction on the less affluent Americans

who depended on federal aid. The debate over proposals to reduce AFDC benefits to households with supported children was not an isolated skirmish, but part of a wide-ranging and continuing struggle, rooted in fundamental differences regarding economic and fiscal policy.

For two and a half years officials of the executive branch lobbied a reluctant Congress to reduce AFDC benefits for recipients in households that included supported children. Executive branch officials proposed statutory language which contained no reference to requiring that supported children be placed on AFDC, and no reference to requiring assignments of the support payments of children who did not want AFDC. Between January 1982 and July 1984 executive branch officials commented on their proposals in testimony,

correspondence, and budget messages.[7] Not once during this entire process was there any mention of compulsory welfare or mandatory assignments. Only weeks after congressional approval had been obtained, however, HHS produced explicit regulations mandating the disputed practices.

The rules of statutory construction should take account of the difficulties often faced by Congress in framing legislation. Executive branch officials trying to win enactment of a contested piece of legislation, like any other

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[7] Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for 1984: Hearings before Subcommittee on the Department of Labor, Health, and Human Services, Education and Related Agencies, 98th Cong. 1st Sess. 528-529 (1983): Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for 1983: Hearings before Subcommittee on the Departments of Labor, Health, and Human Services, Education and Related Agencies, 97th Cong. 2d Sess. 572-573 (1982). J. App. 168-69.

lobbyists, are unlikely to warn that the measure might have a meaning which would increase opposition on the Hill. An unfortunate but undeniable part of relations between these two branches of government is that executive officials at times utilize their particular expertise and knowledge to frame proposals, statements and testimony which, although not literally inaccurate, may convey to a busy Congress an impression somewhat at odds with the actual understanding or intent of those executive officials. The danger of such "misunderstandings" is particularly great in dealing with the Social Security Act, whose very terminology is "an aggravated assault on the English language, resisting attempts to understand it." Schweicker v. Gray Panthers, 453 U.S. at 43, n. 14.

Whatever the drafting problems posed by the Act itself, it is very easy to

articulate in ordinary English the construction which the government now wishes to place on section 602(a)(38). The Secretary of HHS was able to do so with ease and dispatch as soon as the statute was adopted; the Solicitor General explains that proposed construction with his usual clarity, and offers the Court a helpful "simplified example" to illustrate his meaning. But neither that straightforward construction nor that example was ever offered to Congress. Prior to September, 1984, executive branch officials systematically avoided referring either to compulsory AFDC or mandatory assignments of child support. It is of no importance that the words used by those executive officials might have carried a second meaning, apparent to the cognoscenti within the HHS bureaucracy, different than the understanding that would have been

conveyed to an ordinary member of Congress, for it is the understanding and intent of Congress that controls.

(5) Our view that section 602(a)(38) was intended to adjust the grants of actual recipients, rather than to conscript unwilling individuals onto the public assistance rolls, does not by itself provide a full explication of the meaning of the statute. There remains to be resolved what type of adjustment is authorized by the statute. Congress certainly did not intend to give HHS unlimited discretion to devise whatever draconian adjustment scheme would most severely slash AFDC grants. Neither the statute nor the relevant committee reports specify what sort of grant reduction is to occur under what particular circumstances. In light of the vague record, and of the much vetted differences between the legislative and

executive branches regarding the appropriate level of support for indigent recipients of federal aid, the Court must attempt to determine what type or types of grant reduction Congress could clearly have understood it was authorizing when it adopted section 602(a)(38).

We believe that section 602(a)(38) might plausibly be read to support either of two interpretations. First, it may be that, as the Solicitor appears to suggest, Congress was concerned that AFDC recipients in homes with supported children were less needy because they enjoyed the benefit of the economies of scale that occur in larger households. (U.S. Br. 29; cf. Lyng v. Castillo, 91 L.Ed.2d at 532-33). Although some expenses, such as clothing, school supplies, and public transportation, are largely individual, other expenses--particularly rent and utilities -- can

readily be shared, and are ordinarily lower per capita in a larger household. North Carolina AFDC practice quantifies the economies of scale that occur, providing for a lower per capita AFDC grant in larger families.[8] If the purpose of section 602(a)(38) was to require an economy of scale adjustment, that could be achieved simply by basing the grant on the per capita level appropriate for the total number of applicants and supported children in the

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[8] The per capita AFDC, the standard of need and payment standard in 1984 were as follows:

Persons In Household	Per Capita Standard of Need	Per capita Payment
1	$296	$148.00
2	194	97.00
3	149	74.50
4	122	61.00
5	107	53.50
6	96	48.00
7	88	44.00
8	80	40.00

J. App. 51-52, Tables 2 and 4.

household, rather than on the higher per capita level for a household including only the applicants.[9] This economy of scale reduction in the grant would "include" the non-needy children and their income in the "determination" of the per-capita need and grant, doing so in a manner which would "take into consideration" the economies of scale realized because of the incomes of those non-needy children.[10]

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[9] For example, prior to the adoption of section 602(a)(38) the grant for a parent of one child would have been $194, regardless of the number of non-needy children in the home. Under an economy of scale adjustment, the presence of one such non-needy child would lower the per capita payment level from $97.00 to $74.50, thus reducing the actual grant to $149. Similarly, if a mother and two needy children shared their home with two non-needy children, their grant would be reduced from $223 to $160.00.

[10] On this reading 42 U.S.C. § 602(a)(8)(A)(vi) would prohibit such an economy of scale reduction if the total child support received by children in the family was less than $50.

Section 602(a)(38) might be read, in the alternative, to mandate effective state measures to assure that any income of non-AFDC children which was in fact provided to AFDC siblings would be counted as income to those siblings. It is unlikely, however, that Congress intended to permit the state to count all of a non-AFDC child's income as income to the AFDC recipients in the household. Because any such deeming rule would violate the principle of availability, Congress has always spoken unambiguously when it wished to deny grant applicants the opportunity to prove that they were not actually receiving presumed income. The statute in Lyng, for example, expressly denied siblings the chance, afforded to unrelated individuals in a common home, to prove that they were not sharing the cost of preparing meals. See 91 L.Ed.2d at 534-35. Sections

602(a)(31) and 602(a)(39) establish specific fixed formulas for calculating the amount of steppprent and grandparent income which must be treated as available to AFDC recipients in the household. This Court found similar deeming authorized under the Medicaid Act because of a statutory provision permitting a state to "take into account the financial responsibility of any individual for any applicant or recipient ...[if] such aplicant or recipient is such individual's spouse." 42 U.S.C. § 1396a(a)(17)(D). Schweiker v. Gray Panthers, 453 U.S. 34, 44-46 (1981). Section 602(a)(38), on the other hand, contains no such express language permitting a departure from the principle of availability.

The circumstances leading to the adoption of section 602(a)(38) are strikingly different than those which

amendments in Lyng. The Congress that adopted the Food Stamp amendments was prompted by a substantial body of evidence, garnered in a series of House and Senate hearings, that Food Stamp recipients were fraudulently denying that they shared their food costs, and that individualized detection of that abuse was impracticable. Lyng v. Castillo, 91 L.Ed.2d at 534-35 and nn. 4-6; Brief for the Appellant, No. 85-250, pp. 18-19 and nn. 13-19. The Food Stamp amendments were a carefully considered legislative response, albeit a drastic one, to a clear and intractable problem. The legislative history of section 602(a)(38), on the one hand, contains no allegations of any similar abuse regarding the use of child support funds, and no suggestion that the detection of any such abuses would be so difficult as to require the type of rigid rule

involved in Lyng. Congress did not hold so much as a day of hearings regarding the practices of AFDC recipients residing with supported children. It seems unlikely that Congress would have resorted to the sort of harsh measure involved in Lyng in the absence of any evidence of an abuse requiring such a remedy.

The legislative history does not, as the Solicitor suggests, contain any congressional finding that AFDC recipients and supported children in the same household in fact pool all their income and use it to meet the expenses incurred by each of them. The passage of the Senate report on which the Solicitor places primary reliance explains:

> This change will ... ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole. (S.Prt. 98-169, at 980)

The Solicitor suggests that this sentence constitutes a finding that family members who "live together" generally or always "share expenses."[11] That might be a plausible interpretation if the report referred to family members "who live together, and thus share expenses." But the passage as actually written says something quite different, that the purpose of the statute is to "recognize" that income is available to a family as a whole if its members meet two distinct requirements, i.e., they both "live together" and "share expenses." It is difficult to read into this sentence an intent to count income as "available" to an entire family if its members do "live

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[11] The Solicitor also argues that the record in this case demonstrates that child support is generally diverted to AFDC recipients. (U.S. Br. 41 n. 14). The district court, however, found that the testimony relied on by the government showed that such diversions occurred, at most, in moments of "financial crisis." (N.C.J.S. A-64).

together" but do not "share expenses." Although the Solicitor also refers to several staff reports to the Senate Finance Committee, and to a letter from the Secretary of HHS to the Vice-President, neither type of document carries significant weight in ascertaining the intent of members of Congress itself. The Solicitor does not actually assert, for example, that Secretary Heckler's typewritten letter was actually read or relied on by members of Congress, or that it was ever referred to or quoted in the legislative history. Compare Teamsters v. United States, 431 U.S. 324, 351 (1977) (Justice Department statement placed in Congessional Record by floor managers of bill; See Watkins v. Blinzinger, 789 F.2d 474, 479 (7th Cir. 1986)("[T]he words of the staff are not the equivalent of statements in committee reports").

On this reading section 602(a)(38) would mandate the state to inquire into the manner in which AFDC parents are utilizing child support funds. To understand the significance of such a statutory requirements it is necessary to refer to the terms of the original 1971 decree in Gilliard v. Craig. Paragraph 3 of that injunction forbad state officials from crediting to AFDC recipients the income of others in the household "without first detrmining that such income is legally available to" the AFDC recipients. (N.C.J.S. A-110). Under the terms of the decree the critical issue was whether the income in question was "legally available" to the AFDC recipients, not whether it was available in fact. The language of the injunction, if read literally, appeared to preclude reducing an AFDC grant because a non-AFDC child in the home was receiving child

support that was not "legally available" to others in the household, regardless of how the funds were actually being spent. The 1971 opinion held that North Carolina could not, in calculating the AFDC budget of an applicant, consider the resources of a non-applicant whose income exceeded his or her standard of need, reasoning that such a non-applicant had to be disregarded because he or she had too great an income to be eligible for AFDC. The opinion made an exception for cases in which there was "parental consent" to inclusion of those resources but made no provision for non-applicants whose income was in fact being shared with actual AFDC applicants. (N.C.J.S. A-98).

This Court's 1972 decision affirming the opinion and order in Craig v. Gilliard, 409 U.S. 807, made the principles thus upheld binding throughout the country. Edelman v. Jordan 415 U.S.

651 (1974). Although the precise legal significance of that summary affirmance might have been fairly debatable, North Carolina, like other states, evidently proceeded on the assumption that child support, since not "legally available" to anyone else in the household, could not be considered no matter how it was actually spent. Between the issuance of the 1971 injunction and the 1984 implementation of the HHS regulations, North Carolina simply made no effort to ascertain how child support funds of non-recipients were in fact being used. This was not, as in Lyng, a case in which inquiries into family practices proved futile, but, rather, a situation in which such inquiries simply were not attempted.

Section 602(a)(38) could fairly be construed to forbid this practice of disregarding whether support funds were in fact being diverted to AFDC

recipients. On this reading the statute would direct the states at the least to subject child support payments to the same, often exacting scrutiny applied to other funds in the possession of the AFDC parent, requiring the parent to provide periodic reports regarding the manner in which those payments were being disbursed, and insisting on verification of an applicant's representations. A state which had reason to doubt the accuracy of those reports would have to invoke the same procedures available for resolving any dispute about the availability of income to an AFDC recipient. If an applicant or recipient failed to provide a state with relevant requested information regarding the disposition of support funds in her possession, the state could undoubtedly make an appropriate reduction in her grant.

The language of section 602(a)(38), as we suggested earlier, could plausibly be read either to mandate such inquiries and reductions or to require an economy of scale adjustment in the grants of AFDC applicants living with non-AFDC siblings. Under these circumstances, we believe that HHS should be accorded the discretion to decide which method to use in implementing section 602(a)(38).

(6) Section 602(a)(38), as the Solicitor construes it, would if constitutional override state law in a variety of ways. In North Carolina, as is true throughout the nation, state domestic relations law requires that support payments be spent "for the benefit of" the supported child, N.C. Gen. Stat. § 50-13.4(d), but section 602(a)(38), in the government's view, requires that about one third to one-half of those funds be spent to acquire

AFDC benefit for the child's parent and siblings. North Carolina law directs that the support payment be set by the state court at a level sufficient to meet "the reasonable needs of the child," N.C. Gen. Stat. § 50-13.4 (b), but §602(a)(38), as the Solicitor reads it, directs that the supported child actually receive only a fraction of the funds judicially determined to be necessary to meet those needs. The inescapable effect of the disputed HHS regulations is to strip state judges of the power to direct an award of child support to a child who happens to reside with siblings on AFDC; in such a case the child support will, as a practical matter, have to be shared with the siblings and custodial parent on AFDC, despite the contrary intent and direction of the state court which ordered that payment, and despite the terms of the North Carolina statute

authorizing child support orders. See Br. of Amicus Curiae of National Council of Juvenile and Family Court Judges.

Congress, we believe, has no authority to override state law in this manner. Nothing in the powers enumerated by Article I confers upon Congress the ability to adopt a general domestic relations law applicable to the population at large. "Nor as a general proposition is the United States, as opposed to the several states, possessed of residual authority that enables it to 'define' property in the first instance." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980). The detailed provisions of the Social Security Act are an exercise of congressional power under the Spending Clause; Congress undeniably has the ability to impose on willing participants in federal programs obligations which could not be extended

to the public at large. A requirement that supported children who want to receive AFDC assign their support payments to the government, to the extent that it might displace state domestic relations law, falls within the authority of Congress under the spending power. Cf. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979). But where, as here, state domestic relations law governs the property rights of a child who neither wants nor needs federal assistance, it is difficult to see how the Spending Power could provide the Congress with any authority to displace those state rules.

This Court has repeatedly held that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." In re Burrus, 136 U.S. 586, 593-94 (1890). Federal statutes have

been construed to pre-empt state law in this area only if Congress has "positively required" the pre-emption of state law "by direct enactment." Wetmore v. Markoe, 196 U.S. 68, 77 (1904). "[P]re-emption is not to be lightly presumed." California Federal S. & L. Assn. v. Guerra, 93 L.Ed.2d 613, 623 (1986). State law will prevail in the absence of a "clear and manifest purpose" by Congress to override that state provision. Pacific Gas & Electric Co. v. State Energy Resources Comm'n, 461 U.S. 190, 206 (1983). Nothing in the legislative history of section 602(a)(38) indicates any intent to override state domestic relations law, or any understanding that the proposed legislation might have such an impact. That history and the language of the statute suggest, at most, a desire to recognize misuse of support funds if and

when and when it actually occurred, not an attempt by Congress to require such violations of state domestic relations law.

Where a statute such as 602(a)(38) reasonably lends itself to two or more different interpretations, the law should be construed in a manner that avoids serious constitutional questions. We urge, for the reasons set out at length below, that the Solicitor's proposed interpretation of section 602(a)(38) would render it unconstitutional. The interpretation of the statute which we propose, on the other hand, would avoid those constitutional problems. If, as we urge, section 602(a)(38) is susceptible of a constitutional interpretation, such a construction would avoid the administrative problems that would arise if the statute were struck down and

Congress were required to enact a constitutional substitute.

II. THE APPELLANTS' PRACTICES WORK AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY

This case turns on the interrelationship of two distinct and longstanding legal principles. This Court has repeatedly held, as the Solicitor General correctly observes, that the formula for allocating social welfare benefits ordinarily need meet only a rational basis test. Lyng v.Castillo, 91 L.Ed.2d 527 (1986). This Court has also insisted, however, most recently in Hobbie v. Unemployment Appeals Commission (No. 85-993, slip opinion February 25, 1987), that the government cannot, in providing such benefits, establish conditions which are themselves unconstitutional, or impose substantial and direct burdens on constitutionally protected activities.

Where, as in Hobbie, a social welfare program is operated in a manner which imposes such an unconstitutional condition, that restriction must be struck down, even though it might otherwise meet the minimal rational basis requirement of Lyng. Hobbie, slip opinion p. 5. The disposition of the instant appeal turns largely on whether the practices at issue merely reflect a reasonable attempt, as in Lyng, to ascertain the needs of benefit recipients, or whether those practices, as occurred in Hobbie, effectively condition the distribution of those benefits on the abandonment or violation of a substantive constitutional right.

A. Child Support Funds Are Protected by the Taking Clause

In North Carolina, as throughout the nation, child support funds are the private property of the supported child. North Carolina statutes provide that

child support payments are to be paid to the custodial parent "for the benefit of such child." N.C.Gen. Stat. § 50-13.4(d). In litigated support proceedings, the amount of the payment is carefully calibrated to meet the particular needs of the supported child, "including his or her health, education, and maintenance." N.C.Gen. Stat. § 50-13.4(c). Although support payments are ordinarily made to the adult who is the custodial parent, that parent

> is not the beneficiary of the moneys ... These monies belong to the children. [The custodial parent] is a mere trustee for them.... She cannot ... profit at the expense of the children.

Goodyear v. Goodyear, 257 N.C. 374, 379, 126 S.E.2d 113, 117 (1962). "It is a violation of a court order for a custodial parent to spend the child support on other children not designated in the child support order." (N.C.J.S.

A-43 to A-44, quoting affidavit of state court judge).[12] The federal Internal Revenue Code does not treat child support payments as income to the custodial parent, since that parent may use the funds only to meet the needs of the designated child, and cannot "spend the monies ... as she sees fit" for herself or third parties. Commissioner v.

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12 See also Scott v. Commonwealth of Pennsylvania, 46 Pa. Cmnwlth. 403, 406 A.2d 594, 596 (1979) (child support funds "belong to that [designated] child and not to other children or the mother); Ditmar v. Ditmar, 48 Wash. 2d 373, 374, 293 P.2d 759, 760 (1956) ("a mother has no personal interest in child-support money and holds it only as a trustee"); Watts v. Watts, 240 Iowa 384, 391,36 N.W.2d 347, 351 (1949) (child support payments "not the property of the [mother]. She was merely the custodian of the funds ...;" Rand v. Rand, 40 Md. App. 550, 392 A.2d 1149, 152 (1978) (child support funds must "be applied exclusively to the ascertained needs of the child ... not to any extraneous purposes"). Bourque v. Commissioner of Welfare, 6 Conn. Cir. 685, 308 A.2d 543, 546 (1972) (fact that support payments are made to mother does "not alter the fact that the benefits were for the use of the child.").

Lester, 366 U.S. 299 (1961).

The Solicitor appears to base his brief on the premise that the child for whom support payments are made has "no ... property right" "to ... prohibi[t] the mother from spending the money on anyone other than the designated child." U.S.Br. 33). If the Solilcitor or the Attorney General of North Carolina are suggesting that a custodial parent could legally use support funds intended for one child to purchase clothes for the child's brother, pay bus fares for the child's sister, or buy presents for a friend, they are plainly mistaken.

The effect on child support payments of the HHS regulations can readily be illustrated by a simple example. Under the 1984 benefit schedule, a mother such as Dianne Thomas with one child on AFDC would receive a monthly AFDC grant of $194. If the mother gave birth to or

acquired custody of a second child, and received support payments of $200 per month for that child, the mother would be required, on pain of forfeiture of her AFDC benefits, to assign the child support payments to the state, and to put the second child on AFDC. In return for this $200 which the state received each month, state officials would pass onto the mother the first $50 of that support payment, and provide an additional AFDC allotment of $29, for a total of $79.[13] The difference of $121 would be retained by the state as a net profit from the transaction. No matter how large the

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[13] Depending on the number of children who were previously receiving AFDC, the additional grant for the new child could be as little as $13. (J. App. 52).

The Solicitor General also suggests that by applying for AFDC, the supported child also receives Medicaid. (U.S. Br. 39). Medicaid is available in North Carolina, albeit on somewhat different terms, to children not receiving AFDC.

child support payment which is received by the state in a given month on behalf of a supported child, the state will not provide for the child in return more than a total of $79; the net difference is simply kept by the state.

This practice certainly has the trappings of the type of uncompensated taking which the Fifth Amendment prohibits. Although the initial seizure and diversion of support funds is made by the custodial parent of the child involved, that parent clearly acts at the direction and behest of the state. Cf. Adickes v. S. H. Kress & Co., 398 U.S. 144, 170-71 (1970). "The state . . . us[es] one set of children's needs as a lever to coerce a mother either to break her legal obligation to the child receiving child support or to see her other children go hungry without AFDC." (N.C.J.S. A-58). The consequences of

that threatened sanction are so catastrophic that virtually every mother in North Carolina agrees to do the state's bidding. If such a mother were directed, on pain of loss of AFDC, to seize the money of a stranger and turn it over to North Carolina officials, that seizure would unquestionably constitute state action; the seizure here is no different. It is of no constitutional significance that the funds are seized before they reach the child, rather than being physically taken out of the child's hands after receipt. Cf. Sniadach v. Family Finance Corp., 395 U.S. 377 (1969).

This arrangement is manifestly unlike the circumstances presented by Lyng; indeed, so far as we are aware it is unique even in the byzantine realm of welfare law. In Lyng, the respondents had applied for a federal benefit and

complained that the level of that benefit they received had been set at an unconstitutionally low level. Here the affected children, prior to 1984, were receiving no AFDC benefit; they were not then part of the AFDC program, and still prefer to continue to remain outside it. The money in dispute in this case is not, as in Lyng, government funds, but the private property of the supported children.

In the instant case the use of benefit conditions to work an apparent constitutional violation is, in one respect, even more egregious than in Hobbie. Ms. Hobbie was only being asked to sacrifice her own constitutional rights in order to receive a government benefit; if she had chosen to relinquish the right to keep the Sabbath on Saturday, it would at least have been of her own choice, and she would in return

have escaped the financial penalty imposed by the state. Here, on the other hand, a threatened denial of benefits is used to conscript AFDC mothers to act as ad hoc state agents, directed to violate the constitutional rights of children who are given no choice and who receive nothing in return. It is as though, in Hobbie, Florida had withheld unemployment compensation from any parent who permitted his or her children to keep the Sabbath on Saturday. Such a rule, as here, would work a direct constitutional violation, rather than merely impose an unconstitutional condition. Adickes v. S.H. Kress & Co., supra.

In defense of this practice the Solicitor General makes two distinct types of contentions. First, he offers arguments which, if sustained, would render constitutional the seizure of child support funds in the manner at

issue even if the child was not living with a parent and indigent sibling receiving AFDC. Second, the Solicitor contends that, even if such a seizure would be unconstitutional as applied to the general population, the seizure is permissible where it occurs as a result of conditions imposed on the receipt of AFDC.

B. The Constitutionality of the Obligations Imposed by Appellants' Practices

There would seem to be little doubt as to the unconstitutionality of any statute which, in order to subsidize a state's AFDC program, simply expropriated one half of all child support payments paid to any child in the general population. Such a confiscatory scheme would be precisely the sort of practice condemned by the Taking Clause, "forcing some people alone to bear burdens which, in all fairness, should be born by the

public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). The Solicitor General does not expressly suggest that, as a means of defraying the cost of AFDC, Congress or North Carolina could simply expropriate a substantial portion of all child support payments received by any minor in the state. But the Solicitor advances several arguments which, if credited, would compel the conclusion that such a scheme would indeed be constitutional.

The Solicitor urges, first, that "the 'economic impact' of the challenged legislation ... is not so great as to effect a taking." (U.S.Br. 37). He observes, for example, that the amount of money taken from any single child is far smaller than the economic injury sustained by the owners of the gold mines at issue in United States v. Central Eureka Mining Co., 357 U.S. 155 (1958)

(U.S.Br. 37-38 n. 10). To some Americans the seizure of $50 or $100 a month might indeed seem relatively minor; it is undeniably smaller than the amounts of property at issue in previous Taking Clause cases. But for the indigent and the working poor, many of whom are surviving on a per capita monthly income of little more than $100,[14] the seizure of even a modest amount can be catastrophic. As a result of the seizure and retention of the child support funds at issue, the mothers in the instant case have been unable to buy shoes and clothes for children who prior to October 1984 were receiving at least a subsistence level of child support.[15] What may seem a pittance to the affluent may well be a necessity for the less fortunate.

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14 See N.C.J.S. A-13 to A-29.

15 N.C.J.S. A-16, A-22, A-30; see also id. at A-16 (no phone service), A-25 (no toys, car seat or high chair).

The Taking Clause, which safeguards the mansions of the rich and the factories of the wealthiest of corporations, protects with equal vigilance the pennies of the poor.

The Solicitor suggests, in the alternative, that any negative economic impact may be only an occasional unintended effect of a benign government practice. The $50 set aside, he asserts, was adopted because "the child support assigned to the state in consequence of the new filing-unit provision might sometimes be greater than the marginal increase in AFDC benefits obtained by the family by filing as a larger unit." Any net loss of child support, he suggests, was merely a "potential disadvantage" of the 1984 legislation. (U.S.Br. 14) (Emphasis added). This innocuous characterization of the regulatory scheme is wholly inconsistent with the

Solicitor's argument that the very purpose of section 602(a)(38) was to bring about a net loss of child support to the affected children, and a corresponding gain for the state and federal governments.

The Solicitor also contends that the challenged practices do not constitute a taking because, although North Carolina does not pass on to each child the full amount of the support payment which the state obtained, the state does return an amount "that reflects the needs of the child." (U.S.Br. 39). This would indeed be a compelling argument if the constitutional principle embodied in the Taking Clause were that the government may take from each according to his ability, so long as it provides to each according to his needs. Under such a doctrine, North Carolina might well choose to expropriate all child support

funds in the state and disburse to each affected child an equal monthly stipend. The North Carolina practice of demanding assignment of a minor's child support matches with harsh exactness the child's ability to pay; the grant which the child receives in return "reflects," but does not purport to meet, his or her essential needs, since the grant equals less than one third of the federal poverty level. But while there are undeniably jurisdictions which believe that property should be confiscated in proportion to each individual's ability to pay, and redistributed according to each person's particular needs, that does not happen to be the view of private property embodied in the Taking Clause.

Even if the seizure of these funds constitutes a taking, the Solicitor argues that the affected child receives "just compensation" because, in addition

to a monthly stipend of $79 or less, the child enjoys the benefit of government aid in collecting the child support. Although the child forfeits all but $50 of the funds collected each month, the state assumes "the burden of pursuing non-custodial parents who fail to satisfy their support obligations." (U.S.Br. 39). In addition, the Solicitor notes, the child is guaranteed an additional allotment, in practice between $13 and $29 a month, "regardless of the state's ability to collect from the absent father." (Id.). The Solicitor General professes incomprehension that the district court failed to grasp the fairness and generosity of this seemingly beneficent plan. (U.S.Br. 37). If such an ostensible fee-for-service scheme were constitutional, a state could indeed treat all children in this way, regardless of whether their siblings

happened to be on AFDC.

A state could certainly establish an optional child support service with fees reasonably related to the cost of collection. Federal law in fact requires North Carolina to offer just such assistance, on a voluntary, at cost, basis, and that program is undoubtedly constitutional. 42 U.S.C. §§ 651 et seq. But the practices at issue here, even as the Solicitor characterizes them, require participation by many parents and children who neither need nor want government help in collecting child support, and impose a fee - typically all amounts collected in excess of $50-$80 per month -- which would make a robber baron blush. In August, 1985, for example, North Carolina took from Arvis Water's two youngest children $760 of an $810 check; the compensatory service which the state provided in return was

the assistance of AFDC officials in cashing the $810 check which the state had received from the clerk of the Bronx Supreme Court. (N.C.J.S. A-27). Check cashing is at times a useful service, and its value might reasonably be considered, as the Solicitor suggests, in deciding whether just compensation has occurred. But a fee of $760 for cashing an $810 check is rather higher than the fair market value for that service.

Even if the seizure of child support payments to subsidize AFDC is a taking, the Solicitor suggests that the only appropriate remedy may be individual civil actions for just compensation, rather than a class action to enjoin the taking. (U.S. Br. 40 n. 13). We are not entirely sure that this is a serious suggestion. The number of affected class members in the instant case between 1984 and 1986 was more than 26,000; nationally

the total number of individuals whose funds are being seized each year is far larger. It seems unlikely that the United States believes that either the federal or state courts are capable of handling such a volume of litigation, or that the purposes of federalism would somehow be well served if this Court were to inflict such a burden on the courts of North Carolina, rather than sustain the simple injunctive remedy ordered by the district court below.

C. The Constitutionality of Imposing Such Obligations As A Condition of AFDC

The fact that the North Carolina could not directly impose the obligations and restrictions inherent in the disputed AFDC rules is not, of course, dispositive of this litigation. Where an otherwise impermissible government requirement or practice occurs in the context of a social welfare program, that context may

provide a justification inapplicable to the public at large. The regulations and contours of any social welfare program will inevitably discourage certain private conduct and encourage other; those incentives and disincentives will not in every instance be so direct and substantial as to be equivalent to a direct government command or prohibition. Lyng v. Castillo, 91 L.Ed.2d at 527.

(1) The Solicitor General contends that no actionable taking has occurred in this case because "participation in the AFDC program is entirely voluntary." (U.S. Br. 35). The Solicitor argues:

> Congress may attach reasonable conditions to participation in such programs. When a person voluntarily complies with such conditions in order to gain access to public benefits that he desires, there is no "taking" of his property. (U.S. Br. 35) (Emphasis added).

The manifest difficulty with this argument is that the individuals who want

to participate in AFDC, and the individuals whose property is being seized, are simply different people. It is the mother and indigent child who "desire" "to gain access to public benefits"; the property being seized, on the other hand, belongs to the supported child. The mother has absolutely no choice but to do the state's bidding; if the mother refuses, she and her indigent child will be denied even the absolute necessities required for survival. The HHS regulations impose on the mother a Sophie's choice, requiring her to choose to sacrifice the financial interests of one child in order to protect the interests of the others. "The falsity of the freedom of the mother, whose options are either to reduce one child's child support income or to cut her other children off from their sole source of support, AFDC, is painfully clear."

(N.C.J.S., A-50).

Having thus conscripted the mother into acting as an agent of the state, North Carolina requires her to deliver to the state child support funds which she holds, not as her own property, but on behalf of the supported child. The supported child, of course, does not consent to anything; the mother, who is supposed to disburse the child support funds for the support of that child, has in reality been compelled to disburse the funds for the support of the North Carolina Department of Human Resources.

The essentially coercive nature of this scheme readily distinguishes it from the allocation formula upheld in Lyng v. Castillo. In Lyng, respondent Castillo and his wife moved into the home of the wife's daughter, Teresa Barrera. When the Castillos applied for Food Stamps, the allotment provided to them was set at

a lower level because they were living with the Barreras. This Court upheld that reduced allotment as reasonably reflecting "the economies of scale when people buy and cook their food together." 91 L.Ed.2d at 534. But the Barreras were placed under no legal obligation either to feed the Castillos or to subsidize the Food Stamp program; so far as appears from the opinion in that case they did neither.

Lyng would have resembled the circumstances of this case only if Food Stamp officials had required the Castillos, as a condition of receiving benefits, to seize and deliver to the state each month a specified amount of the Barreras' money. The cases would also be similar if in Lyng federal officials had given the Castillos a full allotment of Food Stamps, and then garnisheed Ms. Barreras' salary for an

amount equal to the savings the Castillos had theoretically realized by living at the Barrera home. But neither the Solicitor General nor this Court in Lyng suggested that the United States was entitled to seize the property of the Barreras simply because the Castillos had "voluntarily" applied for Food Stamps.

(2) The Solicitor asserts that "the child support ... assigned to the state is in effect 'returned' to the family in the form of AFDC benefits." (U.S. Br. 32). If this statement were literally true, of course, the instant litigation would never have arisen. The undisputed facts are that, with the exception of the $50 set aside and the $13-29 incremental allotment, "the family" does not receive any additional funds as a result of the mandatory assignment of child support payments.

The particular manner in which North

Carolina actually accounts for the child support funds of a conscripted AFDC recipient highlights the confiscatory nature of the transaction.[16] When Dianne Thomas reluctantly agreed to apply for ADFC for her son Sherrod, the state increased the AFDC grant by only $29. But the state then insisted that Sherrod's father was indebted to the state for $111.50, half of the total grant to Sherrod, his mother and his sister. If Sherrod's father were to make support payments of more than $111.50, however, North Carolina still would not return the difference to Ms. Thomas or her son; instead, the surplus would be allocated by the state to reduce the "debt" owed to the state by the father of Sherrod's sister.

(3) The Solicitor General, although

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[16] This procedure is described in the deposition of Dan Miles, pp. 24-29.

not directly denying that child support funds are the property of the designated child, insists that the custodial parent is not restricted to using the funds for items which the child "alone will be permitted to use." (U.S. Br. 33). An indigent child may of course wear clothes or play with toys purchased for an older supported sibling. Child support payments may be used to pay a fair proportion of necessarily shared expenses such as rent or utilities, thus reducing the expenses of the mother and indigent child. These are precisely the types of considerations which underlie the economies of scale described above, and they might well provide a basis for reassessing the needs of the mother and indigent child.

But the incidental conferring of such collateral benefits on others in the supported child's home is altogether

different from an expenditure to acquire items for the exclusive or primary purpose of benefiting the custodial parent or any family member other than supported child. Where support payments are made for a young boy, the money obviously cannot be spent for a blouse for his mother or a dress for his sister. A fortiori the mother cannot expend half of a child's support payments for the sole purpose of acquiring AFDC benefits for herself and her other children.

The state argues that it is in the "best interest" of a supported child for his or her custodial parent and siblings or receive AFDC; thus, the state suggests, a custodial parent may take child support intended for one child and use it instead to acquire AFDC for the parent and a different child. (N.C.Br. 13). Obviously any child benefits to some degree if relatives in his or her

household are better off; in that sense it could be said that it would be in the "best interest" of a child if his or her child support were used to support all the relatives in the home. But the purpose of designating the beneficiaries of a child support order is to specify which individuals are and are not to receive that support; the amount of such an order is calibrated to reflect the particular needs of the designated recipients alone. The very existence of such a designation is inconsistent with the state's suggestion that the "best interest" of a beneficiary could be construed to include assuring that his or her non-designated relatives are well clothed, fed and housed.

(4) The Solicitor contends that the constitutionality of the seizure which occurred in this case should be determined, not by the standards

applicable under the Taking Clause to a seizure, but by the less stringent standard which would be appropriate if North Carolina, rather than actually seizing the funds of the supported child, had chosen instead merely to reduce the AFDC grant to the mother and indigent child. This lesser standard, the Solicitor suggests, is appropriate because a hypothetical practice of reducing AFDC grants might have had "the same economic bottom line" as the seizure which actually took place. (U.S. Br. 34-35).

The Solicitor's argument would literally stand on its head a century of decisions construing the Taking Clause. Since at least 1872[17] this Court has held

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[17] Pumpelly v. Green Bay Co., 80 U.S. 166, 177-78 (1872) (flooding of land); see also Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922); (cannon fired over land); United States v. Causby, 328 U.S. 256, 261-62

that a government practice which has "the same economic bottom line" as a physical seizure of property must be redressed by just compensation. Not every limitation of land use constitutes a taking, but it has never been suggested that a physical seizure of property would fall outside the Fifth Amendment if the government were able to hypothesize a practice equally injurious to the owner which would not literally utilize such a seizure. Similarly, this Court noted in Hobbie that the denial of benefits in that case imposed "the same kind of burden on the free exercise of religion as would a fine imposed ... for ... Saturday worship." (Slip opinion, p.4). The conclusion compelled by that functional equivalence was that the denial of benefits was unconstitutional,

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(1946) (flight path less than 100 feet above land).

not that fining Saturday worshippers would be permitted by the Free Exercise Clause.

(5) In addition to the 19,000 class members affected by the outright seizure of child support funds, the benefits of approximately 3,000 AFDC recipients were terminated solely because those recipients resided with minor siblings who were receiving a substantial child support payment.[18] Prior to the adoption of the HHS regulations, for example, Mary Medlin and her two older children were receiving a grant of $223; her two younger children, who were not on public assistance, were living on a total of $250 in child support. In October 1984, Ms. Medlin, as directed by state officials, sought AFDC for the two younger children, and agreed to assign

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[18] List of Class Members, filed Decemer 11, 1986. See J. App. 16.

their support rights to the state; state officials then ruled that, because of the amount of that child support, all the children, as well as Ms. Medlin herself, were ineligible for AFDC. (N.C.J.S. A-18).[19] Under the HHS regulations, otherwise eligible AFDC applicants must be denied assistance if they reside with siblings whose child support payments, less the $50 disregard, are as great as the total AFDC benefit which would be paid to an applicant family composed of both the actual applicants and the supported siblings. In effect, HHS regulations require a state to act as though child support payments, which cannot legally be used to support either non-designated children or the custodial parent, were in fact income which the mother was free to spend on herself or

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[19]This determination appears to have mistakenly ignored the $50.00 disregard.

anyone else in the household. Neither appellant addresses the constitutionality of terminations made on this basis.

These terminations, we urge, are constitutionally indistinguishable from the taking which would occur if the state continued the AFDC benefits but expropriated an equal amount in child support payments. They are indistinguishable, not because the economic consequence to the state is the same, but because both schemes require the custodial parent to seize and misuse the child support payments of one child in order to assure to herself and the non-supported siblings the essentials which AFDC would readily provide if the supported child did not live in their home. This situation is quite unlike Lyng v. Castillo where, if the Castillos were denied Food Stamps, the Barreras could have chosen to refuse to make up

the loss with their own funds. Here the custodial parent whose benefits are terminated because of the presence of the supported child is herself in control of that child's funds. In such circumstances the custodial parent has literally no choice but to either misappropriate the support funds or, as did Ms. Medlin, surrender to another adult custody of the supported child.

Ms. Medlin would have been under similar pressures if North Carolina had had no AFDC program, just as Ms. Hobbie would have been subject to substantial economic pressures to work on her Sabbath if Florida had had no unemployment compensation program. But having a system of benefits generally available to the population as a whole, a state cannot carve exceptions which, as in Hobbie, burden constitutionally protected activities or which, as here, inexorably

and forseeably cause harms which the state itself could not constitutionally inflict.

It is difficult to explain the termination of AFDC in these cases except as the result of a deliberate effort to force the custodial parent to misuse the child support funds. The loss of AFDC occasioned by a termination is far larger than might be necessary to account for any additional income which the actual AFDC recipients might, prior to the termination, have been receiving in diverted child support funds. In September 1984, for example, the two supported children in the Medlin household were receiving $250 a month in child support, while Ms. Medlin and her two other children were receiving an AFDC grant of $233. Assuming, arguendo, that some support funds were being diverted to the AFDC recipients, only a small portion

of the support funds could have been involved; even if the funds were pooled, and the total of $483 were divided equally among the five members of the household, the net diversion to the AFDC recipients would have been only $56, far smaller than the $233 reduction that was actually made in their grant.

Similarly, the practice of actually expropriating support funds is too harsh to be explicable as an attempt to adjust for any diversion of support funds to voluntary AFDC applicants, since those funds are seized and retained even where the supported children have less support per capita than the AFDC recipients themselves. If Sherrod Thomas, for example, had been receiving $90 a month in child support, his income would have been lower than the $96 per capita grant to his mother and sister; under those circumstances, even if Ms. Thomas did

treat all the income as a pool, there would have been no net transfer to the two AFDC recipients. Yet despite that fact, under the HHS regulations North Carolina would still return to Sherrod only a portion of the child support which it received for him. The system is undeniably contoured to reduce to AFDC levels the standard of living of any individual who resides with an AFDC recipient, and to require that that individual's funds be exhausted supporting the recipient before any assistance is provided to anyone in the home.

Neither HHS nor North Carolina, we urge, could rationally base its allocation of AFDC funds on the assumption that all AFDC parents who receive child support for a non-AFDC child are unlawfully spending those funds on themselves and on non-designated

children. This is not a situation, as existed in Lyng v. Castillo, where the funds of the more affluent household members could legally be used to buy food for their indigent relatives; the Barreras were certainly free to assist the Castillos in that manner, and it might have been reasonable to assume that most people in the position of the Barreras would ordinarily do so. In the instant case, however, North Carolina law expressly forbade Ms. Medlin from diverting to herself or her indigent children the support payments that she was receiving for her non-AFDC children, and such a diversion would have constituted a violation of the court order pursuant to which most of the support was received.

The vast majority of Americans undoubtedly respect the commands of the laws of the states in which they reside,

and take seriously the terms of any applicable court order. The Solicitor's brief appears to contend that it is a matter of "common sense," based on "human experience," that parents on AFDC, unlike other citizens, would not respect the legal restrictions on child support funds in their possession. (U.S. Br. 22, 46). Such preconceived notions that poor people systematically disregard legal obligations respected by others are, we urge, insufficient to provide a rational basis for the disputed practices. North Carolina could not terminate all grants to existing AFDC recipients on the assumption that, because they were poor, they were probably violating the AFDC regulations; it is hardly more reasonable for the state to terminate a particular group of recipients by presuming the occurrence of misconduct that would violate both the AFDC regulations and

state domestic relations law.

The terminations are particularly unreasonable because, by assuming that every parent involved is violating North Carolina law, those terminations virtually compel that very abuse. Parents who are in compliance with state law are not accorded any opportunity to allege or demonstrate they are obeying the law. North Carolina need not, of course, close its eyes to the possibility that any group of AFDC recipients may have undisclosed income. Since AFDC parents who manage child support funds, like AFDC parents who work part time as bank tellers, have an opportunity not available to other recipients to obtain additional income, the state could subject those parents to particular scrutiny. Any state participating in the AFDC program may require recipients to provide essential material information,

and may terminate those families that refuse to do so. Consistent with that general practice, North Carolina could certainly insist that AFDC parents with control of child suppport funds to account for the use of that money; if the recipient failed to provide that information, the state could reduce or adjust the recipient's grant in an appropriate manner. But such a practice would be very different than a rigid rule framed on the premise that an entire class of AFDC recipients is systematically violating that law.

(6) Throughout his brief the Solicitor suggests, in words evocative of an earlier simpler time, that the people affected by the disputed practices should be regarded, not as individuals, but as members of a family. It is "the family" whose needs were reduced by child support, "the family" that voluntarily

applied for AFDC, "the family" which received the grant, and "the family" which thus "cannot be heard to complain of a 'taking'." (See, e.g., U.S. Br. 29, 36). The Solicitor General asks the Court, in the name of "the family," to uphold a practice which has the predictable and demonstrable effect of driving mothers to relinquish custody of their children, deterring fathers from making essential child support payments, provoking hostility and even violence between the parents, and reducing already impoverished children to a state of absolute destitution.

The Solicitor's analysis conjures up the image of an idyllic home in which children live together with their common mother and father, in which the financial interests of all members are identical, in which any income is properly used to meet the needs of everyone, share and

share alike. But the related parents and children affected by the practices at issue in the instant case are in reality scattered among three or more separate, possibly antagonistic households. The vital nurturing relationship between parent and child, so vital to the well being of both, continues, but it is subject to extraordinary strains and pressures. The nuclear family has been torn asunder by divorce or abandonment, and complicated by prior or subsequent relationships and children. Under such circumstances, financial resources and support obligations, matters ordinarily dealt with through mutual agreement within traditional unified families, must be specifically allocated and regulated by state domestic relations law. To pretend that this is not occurring, or that it is somehow unnecessary, would inevitably be to worsen an already

difficult situation.

III. THE APPELLANTS' PRACTICES UNCONSTITUTIONALLY BURDEN FUNDAMENTAL RIGHTS

Lyng v. Castillo mandates a two-part analysis where a government practice is challenged because it allegedly burdens a fundamental right. First, the Court inquires whether the burden "directly and substantially" interferes with the protected activity, 91 L.Ed.2d at 533, quoting Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978). Where the burden is of that magnitude, it will be held invalid absent a particularly compelling state purpose which can be achieved in no other way. Zablocki v. Redhail, 434 U.S. at 388. Second, if the disputed practice does not directly and substantially burden the protected activity, the Court will consider whether the practice "is rationally related to a legitimate governmental interest." Lyng v.

Castillo, 91 L.Ed.2d at 533.

The district court properly regarded the decision of a parent and child to live together as among the fundamental rights to which this two-part analysis applied. Zablocki recognized that decisions regarding child rearing and family relationships were on "the same level of importance" as the decision to marry. 434 U.S. at 386. If a mother has a fundamental right to decide whether to give birth to a child, surely her decision to raise the child in her own home is entitled to equivalent protection. Id. The ability of parents to decide where their children will live is even more vital than their ability to decide where those children will go to school. See Pierce v. Society of Sisters, 268 U.S. 510 (1925). "This Court has long recognized that freedom of personal choice in matters of ... family

life is one of the liberties protected by the Due Process Clause." Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1974). "[T]he importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association" in a family's home. Smith v. Organization of Foster Families. 431 U.S. 816, 844 (1977). A state which imposed a fine on a child who lived with his or her mother would clearly violate this fundamental liberty; a similar constitutional violation exists where, as here, the state seizes a substantial portion of the child support funds of a child who lives with a mother and sibling on AFDC, but permits the child to retain those funds if custody of the child is given instead to father, grandparent, or non-relative. As the district judge observed, under the

disputed practices, "if a child wants to live with his ... mother and half-siblings, the child must surrender a right to private property, the right to ... money awarded to the child by state court order or voluntarily provided by an absent father." (N.C.J.S. A-62).

When the father and mother of a child do not live together, the existence of financial support from the non-custodial parent is often one of the few strands of a familial relationship that remains between that parent and the child. A prohibition forbidding a non-custodial parent to help feed, clothe or house his or her child would strike at the very heart of their parent-child relationship. (See N.C.J.S. A-72 to A-73). The disputed practices have the effect of virtually prohibiting a non-custodial parent from providing substantial financial assistance to his

or her child if that child resides with relatives on AFDC. North Carolina will expropriate all but the first $50 of any funds which a non-custodial parent tries to provide to such a child; if a father paying $50 a month increases his child support to $150 a month, the child whom he wishes to assist will not receive so much as a penny of that additional $100. The state has gone so far as to prosecute criminally a father who sought to avoid this expropriation by bringing his son food, clothing and diapers. (N.C.J.S. A-18 to A-20). The only way a non-custodial parent can assist such a child is by first providing to the others in the child's household support equal to their entire AFDC grant.

The Court has not attempted to formulate any mechanical rule for determining whether a burden imposed on a fundamental right is "direct" and

"substantial." In Zablocki v. Redhail, 434 U.S. 374 (1978), the Court struck down a state law which forbade a noncustodial parent from marrying if he were subject to a child support order and was too poor to assure that the child at issue would not become a "public charge." In Califano v. Jobst, 434 U.S. 47 (1977), the Court sustained a federal statute which eliminated social security payments to most dependents who married. In Lyng the Court sustained a statute which reduced a family's Food Stamp allotment if it shared a home with certain relatives. Each of these decisions turned on the nature of the burden at issue and the circumstances under which it was imposed. Zablocki, Jobst and Lyng do suggest, however, that a number of considerations are particularly important.

First, the substantiality of an

alleged burden turns to a great degree on the magnitude and likelihood of the financial cost attached to the protected behavior. In Jobst, for example, the Court sustained a benefit scheme which had the effect, by shifting the married plaintiffs between programs, of reducing their per capita monthly grant by only $10. 434 U.S. at 57 n. 17; see also Zablocki, 434 U.S. at 387 n. 12. In Zablocki the Court struck down a scheme which forbade certain individuals from marrying unless they could provide their existing children with enough support to prevent them from becoming public charges. 434 U.S. at 387. In Lyng the challenged reduction in benefits imposed no net burden on most recipients, since it merely reflected the economies of scale they were experiencing by living with their relatives. In the instant case the amount of funds forfeited by a

child who lives with his or her mother equals about one third to one half of his or her child support; the dollar amounts are far larger than in Jobst. Here, unlike Lyng, the net financial loss to the supported children is not an incidental result affecting a few exceptional cases; the imposition of that loss is the very purpose of the challenged practice, and it is inflicted on all of the class members. The disputed practices bear even more heavily on the right of a non-custodial parent to assist his or her child; with the exception of the $50 set aside, all such support is ordinarily expropriated by the state and never reaches the intended recipient. The burden here on the non-custodial parent who wishes to support his or her child is literally several times greater than the burden on the father who wished to marry in Zablocki.

In Zablocki the father could not marry unless he supported at the public assistance level his existing child; here the non-custodial parent who wants to assist such a child cannot do so unless he or she first supports at that level every other child who lives in his own child's home, even though those other children are not related to him.

Second, the Court's decisions consider whether the burden is likely to actually deter those affected from engaging in the protected activity. In Jobst there was no evidence that the challenged statute had ever discouraged anyone from marrying, Zablocki 434 U.S. at 387 n. 12; in Lyng the Court held that it was "exceedingly unlikely" the disputed statute would deter relatives from living together, since the rental cost of separate housing would ordinarily far outweigh any loss in Food Stamps. 91

L.Ed.2d at 533. In the instant case, on the other hand, there is undisputed evidence that mothers have sent their supported children to live with other relatives in order to avoid forfeiture of much of the child's support payments. (J.App. 58). As reluctant as a mother would ordinarily be to surrender custody of a child, from a material perspective the child will undeniably be better fed, clothed and maintained living on $200 with its grandparent or father than living on $79 with its mother. The potential difference in the standard of living such a child would enjoy would necessarily weigh heavily in a mother's decision. The testimony is equally clear that the practice of expropriating all child support over $50 necessarily discouraged non-custodial parents from seeking to provide such assistance; indeed, it would be simply irrational for

a parent who wished to provide such support to actually attempt to do so, since the state is certain to intercept and retain the proferred financial assistance.

Third, the Court has been more willing to overturn a practice whose burdens fall with especial harshness on the indigent. In Jobst, the statute at issue imposed the same financial burden on all Social Security recipients, rich and poor alike, except in the case of marriages between two disabled recipients, on whom no burden was imposed at all. 434 U.S. at 52-53, 54-58. In Lyng, the complete loss of Food Stamps was limited to recipients who moved in with affluent relatives; those living with indigent relatives merely faced an economy of scale reduction. But in the instant case, as in Zablocki, the burden never applies when all the individuals

involved are affluent. If a child receiving $200 a month in support moves in with a mother and sibling living in a mansion in the suburb of Raleigh, the state does not take so much as a nickel of the child's support payments. But if an otherwise identical child moves in with a mother and sibling living on AFDC in a downtown housing project, the child must forfeit to the state a significant portion of his or her support payments. This practice, which places the disputed burden only on children whose siblings and custodial parent are "public charges," cannot readily be distinguished from the practice in Zablocki which burdened only parents whose children were "public charges." See 434 U.S. 404-05. (Stevens, J., concurring). Similarly, although the practice of seizing support funds precludes most non-custodial parents from assisting a child who lives

with AFDC recipients, a non-custodial parent rich enough to support the entire household may, after doing so, provide whatever aid he or she pleases to his or her own child. If Sherrod Thomas' father wants to resume supporting his son, for example, he must first provide $194 a month for the two AFDC recipients in Sherrod's home (See N.C.J.S. A-14). To the right of a non-custodial parent to support his or her child North Carolina attaches a price which only the very affluent could afford.

The burden on the ability of a mother and child to live together is the same regardless of whether the state seizes a substantial portion of the support funds, thus penalizing the child, or reduces or terminates the AFDC grant by an equal amount, thus penalizing the mother. This constitutional problem, like that occasioned by the virtual

prohibition of support by a non-custodial parent, is removed if the state bases its treatment of this situation on a requirement that each AFDC parent provide an accounting of how she uses child support funds, and restricts any reduction or termination of benefits to those cases in which such an accounting is not provided, or in which the state concludes that support funds are in fact being diverted to AFDC recipients.

IV. THE DISTRICT COURT PROPERLY ORDERED THE STATE APPELLANTS TO RETURN FUNDS SEIZED OR WITHHELD IN VIOLATION OF THAT COURT'S 1971 INJUNCTION

In addition to its decision regarding the meaning and validity of section 602(a)(38), the district court held that disputed conduct in this case had violated the injunction issued by that court in 1971 (N.C.J.S. A-7, A-78 to A-79). The district court ordered the state appellants to return to the class members funds which between October 1984

and July 1986[20] had been seized or withheld in violation of that previous injunction. (N.C.J.S. 124-26). This portion of the judgment below was expressly based only on the violations of the 1971 injunction, not on the district court's view regarding the constitutionality of the 1984 HHS regulations. (N.C.J.S. A-78). Accordingly, the correctness of the restitution provisions of the district court's order does not turn on the validity of section 602(a)(38) and should be addressed separately by this Court.

(1) The state appellants argue,

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20 In their district court stay application the state appellants agreed that, if the merits of the section 602(a)(38) issues were resolved against them, they would return all funds improperly seized or withheld after May 7, 1986, the date of the district court's decision. Memorandum of Law in Support of Stay Pending Appeal by the Defendants Third-Party Plaintiffs, p. 16 ("If plaintiffs ultimately prevail on appeal, their right to receive AFDC can be retroactively restored.")

first, that the practices which commenced on October 1, 1984, did not in fact violate the original 1971 decree. The 1971 decree provided that the North Carolina Board of Social Services and its employees were

> restrained and enjoined from directly or indirectly reducing, or continuing to reduce, withholding, or continuing to withhold, the payment to AFDC beneficiaries of any funds on the basis of crediting outside income of one or more members of the family group without first determining that such income is legally available to all members of the family group.

(N.C.J.S. A-110).

The relevant facts are not in dispute. The state appellants do not, of course, deny that beginning in 1984 they directly or indirectly reduced AFDC payments to certain families because of the existence of child support payments. In 1971 that type of reduction was achieved by permitting a supported child

to retain his child support, but directly reducing the family's AFDC grant by an equal amount. (N.C.J.S. A-89 to A-90) In 1984-86 the state achieved a similar result in most cases by seizing part of the child support payment. In other cases state officials terminated all AFDC payments to recipients solely because they lived with children receiving child support. State officials expressly conceded that beginning in 1984 they made no effort to ascertain whether the seized funds were under state law "legally available to all members of the family group."[21] The state appellants do not deny that these practices, if engaged in before 1984, would have been a violation of the 1971 injunction.[22]

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[21] Deposition of Kay Fields, pp. 43-46.

[22] See, e.g., N.C.Br. 23 ("§602 ... now mandates the very conduct which the Gilliard v. Craig court said was violative of the Social Security Act.")

When section 602(a)(38) was first adopted, North Carolina officials candidly recognized that the 1971 Gilliard injunction forbade the very practices which federal officials were then proposing and which North Carolina subsequently implemented. An August, 1984, memorandum by state social services officials acknowledged that the 1971 injunction, unless modified, prohibited the sort of practices contemplated by the then proposed federal regulations:

> The effect of this law in Guilliard [sic] will depend on whether or not the new law supersedes the court order. If it does, Guilliard [sic] would be voided. If not, the State would be placed in much the same position as exists in Alexander v. Hill, i.e., either comply with a court order and lose compliance with Federal regs, or vice versa. (N.C.J.S. A-79).

The district court concluded that this memorandum demonstrated that the "[s]tate defendants were aware of the conflict

between the anticipated ... regulations and this court's outstanding order" (N.C.J.S. A-78); counsel for the state appellants does not challenge this factual finding that state officials believed they were in violation of the 1971 injunction.

In this Court, however, counsel for the state appellants now asserts that the district court's finding of a violation of the 1971 injunction is based on an incorrect interpretation of that earlier decree. In the instant case, the district judge who in 1986 allegedly misunderstood the 1971 decree is in fact the same judge who fifteen years earlier had drafted and ordered into effect that very injunction. The district court's interpretation of its own orders is certainly entitled to considerable weight.

The state appellants assert that the

1971 decree merely directed them to obey the Social Security Act itself. (N.C.Br. 16-23; N.C.J.S. 15). Since the 1984 legislation amended that Act, the state argues, the meaning of the injunction changed as well. Far from violating that earlier decree, these appellants assert, "in effect, the State Defendants indeed were following the original 1971 injunction by modifying their actions in compliance with the amended directives of the Social Security Act." (N.C.J.S. 15). This argument simply flies in the face of the literal language of the 1971 injunction, which includes no reference whatever to the Social Security Act, but contains instead an unambiguous and unqualified prohibition against the very conduct which admittedly has been occurring since 1984.

The state appellants suggest the injunction should be construed to require

only compliance with the Social Security Act because, they now urge, the 1971 opinion on which the injunction was based had condemned the disputed practices solely because they violated the Act as then written. (N.C. Br. 17-20). If this interpretation of the 1971 opinion were correct, it might well have provided a basis for modifying the injunction of that year in light of subsequent, constitutional legislation. But the rationale of the underlying opinion cannot justify disregarding the unambiguous requirements of the injunction itself. It is, moreover, far from clear that the 1971 opinion rested solely on statutory grounds. Sixteen years ago, when Craig v. Gilliard was here on appeal to this Court, North Carolina construed the 1971 decision very differently than it does today, insisting that the 1971 opinion had

declared the practices at issue to be unconstitutional.[23] The dissenting judge in the 1971 decision also believed that the majority had reached its conclusion at least in part on constitutional grounds.[24] The 1971 majority opinion

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[23] The question which the state asserted was presented by the appeal in Craig v. Gilliard was "whether the plaintiffs' rights under the Fourteenth Amendment to the United States Constitution were violated by the defendants reducing their AFDC benefits due to income received by a particular member of the Plaintiffs' family." Jurisdictional Statement, No. 71-1234, p. 4. The jurisdictional statement explained, "It is contended by the Defendant that the Court below committed error in ruling that the regulations used by the North Carolina Department of Social Services and the Mecklenburg County Department of Social Services violated the equal protection rights of plaintiffs." Id., pp. 9-10. The jurisdictional statement did not suggest that the alleged statutory violation was even an alternative basis for the district court's opinion.

[24] N.C.J.S. A-100, ("The majority ... proceeds to strike as violative of the equal protection clause, and in contravention of the Social Security Act ... North Carolina rule ... relative to ... A.F.D.C. ....").

invalidated the then disputed practices because they created "unfair discrimination" and worked "an unlawful appropriation of the funds of both" supported children and their non-custodial parents. (N.C.J.S. A-98). We do not suggest that reasonable people could not disagree about the rationale of the 1971 opinion; Judge McMillan subsequently expressed the view that the 1971 opinion was indeed based on the Social Security Act. (N.C.J.S. A-117). But any such dispute about the rationale and continued propriety of an injunction must be resolved by an appropriate court, not by the party to whom the commands of the decree are addressed.

The state appellants assert, in the alternative, that by adopting section 602(a)(38) "Congress made the 'determination' that child support income 'is legally available' to all members of

the family group comprising an AFDC standard filing unit." (N.C.Br. 24). The state appellants do not, however, point to anything in the legislative history of section 602(a)(38) in which Congress even considered, much less purported to make any decision regarding, the legal restrictions in North Carolina or elsewhere regarding the use of child support funds. The Solicitor General, although advancing an exceedingly expansive view of the legislative history of section 602(a)(38), does not purport to find in that history any hint that Congress intended to evaluate the legal principles controlling the use of child support funds in any of the fifty states participating in the AFDC program. Again, moreover, the language of the 1971 injunction requires that the defendant state officials themselves make a determination of whether particular

support funds were legally available to other family members under state law. The existence of a congressional "determination" might have provided a basis for modifying that injunction, but no such congressional action by itself could remove the obligations imposed by the 1971 injunction on the defendants themselves.

(2) Second, the state appellants argue that their obligation to comply with the literal commands of the 1971 injunction ended in 1984 when Congress adopted section 602(a)(38). Appellants do not merely suggest that they were entitled to return to court in 1984 and seek a modification or recission of the 1971 injunction, a proposition which we would not contest. Rather, these appellants argue that, once section 602(a)(38) was enacted, state officials were at liberty to at once disregard the

outstanding injunction, without first, or ever, seeking a change in that order. The mere adoption of that legislation assertedly "obviate[d] the necessity of the enjoined party following established procedures in petitioning the proper federal forum for relief." (N.C. Br. 26).

The state appellants' argument is inconsistent with the rule long recognized by this Court that when a court with jurisdiction over the relevant subject matter and parties issues an injunction, that order, no matter how unsound, must be obeyed until modified or reversed by a court having the authority to do so. A party which violates such an outstanding injunction may be punished for contempt regardless of whether the injunction at issue was improper or even unconstitutional. This rule is required by "respect for judicial process," and

applies to any person subject to the commands of a mandatory injunction, "however exalted his station, however righteous his motives." Walker v. Birmingham, 388 U.S. 307, 320-21 (1967). This Court has in the past required federal officials,[25] local officials,[26] union organizers,[27] and cpponents of government discrimination[28] to continue to obey disputed injunctions, and to present to the appropriate court whatever objections they might have to the legality of any such order. The state officials in the instant case were subject to the same obligation.

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25 GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980).

26 Pasadena City Bd. of Education v. Spangler, 427 U.S. 424, 439-40 (1976).

27 United States v. United Mine Workers, 330 U.S. 258, 293-94 (1947); Howat v. Kansas, 258 U.S. 181, 189-90 (1922).

28 Walker v. City of Birmingham, supra.

The state appellants do not suggest that disobedience to an outstanding injunction is permissible whenever a subsequent enactment raises questions about the rationale of that order, but assert that disobedience was permissible here because, with the enactment of section 602(a)(38), the 1971 injunction "no longer ha[d] any basis in the law." (N.C.Br. 26). But whether that 1984 legislation indeed eviscerated the rationale of the 1971 injunction can hardly be said to be crystal clear. Appellants' present analysis rests on its assertion that the injunction was originally based solely on appellees' statutory claim, a view which is precisely the opposite of the state's original position. Even assuming that to have been the basis of the 1971 injunction, there was a respectable body of judicial opinion in 1985 and 1986

which rejected appellants' interpretation of section 602(a)(38).[29] Appellants undeniably had a colorable argument for a modification of the 1971 injunction, and a reasonable judge could conceivably have granted such relief. But in the resolution of such a request, as in all other areas of the law, "no man can be judge in his own case." Walker v. Birmingham, 388 U.S. at 320.

Appellants' deliberate violation of the 1971 injunction cannot be justified by their arguments that, had they sought a modification in advance of that violation, "it would have been an abuse of discretion for the district court to have denied the State's request." (N.C. Br. 25). "The proper procedure ... was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to

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[29] See U.S.Br. pp. 5-6 n.2.

its validity." Carroll v. Commissioners of Princess Anne, 393 U.S. 175, 179 (1968). The ordinance underlying the injunction at issue in Walker v. Birmingham was unanimously held unconstitutional by this Court, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), but Reverend Walker, Dr. Martin Luther King, and their co-defendants still went to jail for violating that order.

A party subject to an injunction cannot disregard the commands of that decree merely because subsequent events, such as the enactment of relevant legislation, appear to undermine the original basis of the order. A similar sequence of events occurred in Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976). There, following the district court's issuance in 1970 of a school desegregation order, this Court

formulated a new set of guidelines for such decrees in Swann v. Board of Education, 402 U.S. 1 (1971). In 1974 the school board moved for modification of the decree in light of Swann, and this Court held that Swann required the requested change in the injunction. 402 U.S. at 432-38. The Court also made clear, however, that the board remained under a legal obligation to obey the 1970 injunction until it was modified by judicial action, "notwithstanding eminently reasonable and proper objections to that order." 427 U.S. at 439-40.

Neither Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855), nor System Federation v. Wright, 364 U.S. 642 (1961), permits a party to violate an outstanding injunction because of the subsequent enactment of legislation. Wheeling and System Federation establish

the "rules governing modification of ... a final decree ... by a court of equity," Spangler, 427 U.S. at 437, not rules permitting violation of such a decree by a contumacious litigant. In System Federation the union subject to the injunction at issue filed a motion for modification of that decree in light of the subsequent legislation, and pursued that request to this Court. 364 U.S. at 644-45. Wheeling has always been understood to establish "the power of [a] . . . Court to modify [a] decree", System Federation, 364 U.S. at 646, not to authorize violation of an unmodified injunction.

(3) In the district court, the state officials expressly acknowledged, correctly in our view, that they could be required to return the disputed child support funds if those funds had been seized or withheld in violation of the

outstanding 1971 federal injunction. They asserted in their memorandum on the Eleventh Amendment:

> Edelman v. Jordan holds ... that a federal court can require payment of state funds as "a necessary consequence of compliance in the future with a substantive federal-question determination." ... In light of Edelman ... the deciding question is what conduct did the court declare to be unlawful in its 1971 judgment.[30]

Based on this view of the law, the state officials did not urge the lower court to dismiss appellees' monetary claims under the 1971 injunction, but argued only that the court should dismiss any monetary claim "based on allegations that 42 U.S.C. § 602(a)(38) was unconstitutional."[31]

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30 Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss In Part Plaintiffs' Claim for Retroactive AFDC Payments, pp. 3-4.

31 Id., p. 7.

In this Court, on the other hand, the state appellants assert that the Eleventh Amendment guarantees impunity to a state which violates a federal court injunction. (N.C.Br. 35-36). On the appellants' view, the obligations established by the 1971 injunction, although prospective and thus enforceable when that decree was issued, somehow had become retroactive and thus invalid by the summer of 1986 when Judge McMillan sought to enforce them. The prospective terms of the 1971 decree required state officials to provide AFDC to Mary Medlin and her three indigent children in October, 1984 without regard to the support payments being made to Ms. Medlin's other child, Karen. Appellants concede that the original order was valid and enforceable, despite the Eleventh Amendment, when it was issued in 1971. But, they argue, once state officials

actually violated the decree by cutting off AFDC to the Medlins because of Karen's child support, any enforcement of the decree with regard to the grant for October 1984 became retrospective and thus impermissible under the Eleventh Amendment. Insofar as the 1971 decree applied to the grant to be paid Ms. Medlin for October 1984, appellants assert, the decree was rendered unconstitutional and unenforceable precisely because, and at the point when, state officials violated that decree. On this view the violation of a prospective decree automatically renders unenforceable the very legal obligation that was violated.

The Attorney General of North Carolina asks this Court not merely to overturn the award in this case, but to confer on the state the right to violate with impunity any "mere" federal

injunction with which the state happens to disagree. (N.C.Br. 36) A carefully considered and fairly litigated injunction solemnly issued by a court of the United States is dismissed as only "a judge-made decree" to which "a sovereign state" need pay little heed. (N.C.Br. 35). On this view the Eleventh Amendment was intended, not merely to repeal the citizen-state diversity clause of Article III, but to embody in the Constitution an immunity rule comparable to the doctrine of interposition openly advanced in the 1950's by states determined to disregard federal court decrees. On the Attorney General's view, the state would be free to violate with impunity an injunction issued by this Court against implementation of the disputed HHS regulations just as it violated the original 1971 injunction which had been affirmed by this Court.

In Hutto v. Finney, 437 U.S. 678 (1978), this Court made clear that the Eleventh Amendment does not confer on the states or state officials any such license to violate with impunity injunctions issued by the federal courts:

> In exercising their prospective powers under Ex parte Young ... federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties ... which compensat[e] the party who won the injunction for the effects of his opponent's noncompliance.... The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail.

437 U.S. at 691. Once state officials are under a "court imposed obligation to conform to a ... standard" of conduct, federal courts have plenary authority to issue whatever orders are necessary to bring about "compliance with decrees

which by their terms were prospective in nature." Edelman v. Jordan, 415 U.S. 651, 668 (1974). Hutto and Edelman make clear that a court's authority to issue a prospective injunction necessarily includes the power to correct the effects of subsequent violations of such a decree.

The state Attorney General insists that this view of the Eleventh Amendment in no way limits the "contempt power" of the federal courts. (N.C. Br. 42). But he offers no explanation of what he thinks the district judge should have done when it determined that the 1971 injunction had been violated. Appellants may be suggesting that the district judge could have found the state officials in contempt, and imposed a fine, payable from the state treasury, equal to the amount of child support payments expropriated or withheld in violation of

the 1971 injunction; but such an order would differ only in form from the order to which the state appellants object, and there would surely be no constitutional obstacle if the judge directed that the proceeds of such a fine be paid over to the very indigent parents and children from whom the money was originally taken. If the state objects to that use of the contempt power, the only other conceivable use of that power would be against the defendant officials who personally violated the 1971 injunction. But it is difficult to believe that what the Attorney General is proposing is that the district court in a case such as this should have, and on remand ought to, vindicate the authority of that court by imposing fines or a term of imprisonment on Phillip Kirk, the Secretary of the North Carolina Department of Human Resources, and his subordinates.

The order actually issued by the district court in this case requires the state appellants to do no more than was required by the original 1971 injunction itself. The state officials are obligated to disgorge only the particular funds seized or withheld in violation of the earlier injunction, and the funds are to be disbursed solely to the specific individuals who would have retained or received them had the injunction not been violated. (N.C.J.S. A-124). Although the violation of the injunction may have caused the class members significant consequential financial or emotional injuries (see, e.g. N.C.J.S. A-17), the decree does not mandate the payment of any compensatory damages to redress such harms. Neither does the order provide for pre- or post-judgment interest. The 1986 decree simply requires that the state appellants disburse exactly the

same amounts of money to precisely the same people as was already required by the prospective provisions of the 1971 decree.

Were this Court to adhere to the view of the Eleventh Amendment first espoused in Hans v. Louisiana, 134 U.S.1 (1890), affirmance of the order in this case would be required for the above reasons. But we do not advocate continued judicial efforts to explicate Hans. During the last two terms, four members of this Court have repeatedly urged that Hans should be overruled because that decision appears to be unwarranted by the history and origins of the Eleventh Amendment.[32] Hans remains in force only because a majority of the Court has preferred to postpone

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32 Papasan v. Allain, 92 L.Ed.2d 209 (1986); Green v. Mansour, 88 L.Ed.2d 371 (1986); Atascadero State Hospital v. Scanlon, 87 L.Ed.2d 171 (1985).

addressing that issue. We believe it would be inappropriate to continue to refine the distinctions that grow out of Hans until the Court has reconsidered whether Hans itself is consistent with the intent of the framers of the Eleventh Amendment.

CONCLUSION

For the above reasons the judgment and opinion of the district court should be affirmed.

Respectfully submitted,

JANE R. WETTACH*
East Central Community
Legal Services
Suite 600
5 West Hargett Street
Raleigh, North Carolina 27601
(919) 828-4647

JULIUS LeVONNE CHAMBERS
ERIC SCHNAPPER
NAACP Legal Defense Fund
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

LUCIE E. WHITE
U.C.L.A. Law School
405 Hilgard Avenue
Los Angeles, California 90024
(213) 206 1075

JEAN M. CARY
THOMPSON & McALLASTER
327 West Main Street
Durham, North Carolina 27701
(919) 688-9646

Counsel for Appellees

*Counsel of Record

(9) (11)

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In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BEATY MAE GILLIARD, ET AL.

DAVID T. FLAHERTY, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL., APPELLANTS

v.

BEATY MAE GILLIARD, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

REPLY BRIEF FOR THE FEDERAL APPELLANT

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. In our opening brief (at 23-29), we showed that the district court correctly resolved the threshold

question of statutory construction presented in this case. As the court held, 42 U.S.C. (Supp. III) 602 (a)(38) clearly requires that all co-resident minor siblings be included in the filing unit when the family applies for AFDC, and that any countable income of such persons, including child-support income, be treated as "family income" in determining the family's AFDC eligibility and level of benefits. We showed that this construction of the statute is supported by its legislative history, which explains that while under preexisting law "a family might choose to exclude a child who is receiving * * * child support payments," the newly-enacted Section 602(a)(38) "will end the present practice whereby families exclude members with income in order to maximize family benefits." 1 Senate Comm. on Finance, 98th Cong., 2d Sess., *S. Prt. 98-169, Deficit Reduction Act of 1984*, at 980 (Comm. Print. 1984) [hereinafter *S. Prt. 98-169*]. We explained that these views of the Senate Finance Committee are entitled to considerable weight, since the House bill had no comparable provision, and since the Conference Report adopted the Senate version without substantial change.

In the district court, appellees advanced several statutory-construction arguments, the gist of which was that Congress had not meant to mandate the inclusion of child-support recipients in the filing unit *at all*. We showed in our opening brief (at 25-28) that these arguments were erroneous, and appellees have largely abandoned them here. Appellees now seem to concede that Congress *did* mandate the inclusion of child-support recipients in the filing unit (see Br. 22, 28, 46-47), and that the statute "clearly requires that *some sort of adjustment* be made in an AFDC grant when there are supported children in

a household" (*id.* at 28 (emphasis added)). Appellees assert, however, that the statutory language is "vague" and "opaque," and that it "provides little guidance as to what that adjustment is to be" (*ibid.*). Appellees then proffer two alternative constructions (*id.* at 45-58), the thrust of which is that Congress did not intend to treat *all* of the child-support income, but only some of it, as "family income" for AFDC purposes.

Appellees' argument fails for three principal reasons. First, the language of Section 602(a)(38) is not at all unclear. It says that a state, "in making the determination under [42 U.S.C. (Supp. III) 602 (a)(7)] with respect to a dependent child," shall include co-resident minor siblings in the filing unit, and that "*any income* of or available for such [siblings] *shall be included* in making such determination" (emphasis added). Section 602(a)(7) in turn provides that a state, in determining the need of a dependent child for aid, "shall * * * take into consideration *any other income* * * * of any child or relative claiming [AFDC], or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child" (emphasis added). Nether Section makes any distinction between child-support income and other sorts of income inuring to a co-resident sibling. Both Sections speak comprehensively, mandating the inclusion of "any income" and "any other income," respectively. And the effect of including child-support income in the "determination" made under Section 602(a)(7) is that such income, like the rest of the family's countable income, affects the amount of the family's AFDC benefits more or less dollar-for-dollar. That is because

the amount of benefits paid to the family is based on the difference between the family's countable income and the maximum AFDC grant level prescribed by the state. See U.S. Br. 7. Thus, the statutory language simply leaves no room to segregate child support into "includable" and "excludable" components, as appellees' argument would require.

Second, even if the statutory language were thought to be ambiguous, that would be the classic situation in which the courts should defer to a reasonable construction of the statute by the agency charged with administering it. The Secretary by regulation has construed the statute in the manner we believe to be correct (45 C.F.R. 206.10(a)(1)(vii)), and the district court, like almost every other court (see U.S. Br. 5-6 n.2), has sustained the validity of that regulation. Appellees themselves do not contend that the Secretary's construction of the statute is implausible or unreasonable; indeed, appellees' construction requires a tortured reading of the statutory language and legislative history while ours does not. Even if the statute were thought susceptible of diverse interpretations, therefore, settled principles of statutory construction would require that the Secretary's interpretation, not appellees', be adopted.

Third, appellees' proposed construction of Section 602(a)(38) has no anchor in the text or legislative history of the statute, and it would be utterly unworkable in practice. On appellees' view (Br. 52-53), the state agency, in fixing the AFDC benefit level, would apparently have to make a case-by-case determination of the extent to which families with child-support recipients actually *do* share their income and expenses. This in turn would require the

state either "to inquire into the manner in which AFDC parents are utilizing child support funds" (*id.* at 54), or to make "an economy of scale adjustment in the grants of AFDC applicants living with non-AFDC siblings" (*id.* at 58). But this is precisely the sort of argument that this Court rejected in *Lyng* v. *Castillo*, No. 85-250 (June 27, 1986). The Court there explained, in an analogous Food Stamp context, that "the cost-ineffectiveness of case-by-case verification of claims that individuals ate as separate households unquestionably warrants the use of general definitions in this area" (slip op. 5-6 (footnotes omitted)). In the present context as well, Congress plainly intended to adopt, and in Section 602(a)(38) did adopt, a *standard* filing unit provision. That provision does not contemplate ad hoc investigations into how families spend their money; rather, it proceeds from the generalized premise that family members who live together share their expenses, and it therefore requires that the countable income of all such family members be "recognized and counted as available to the family as a whole" (*S. Prt. 98-169*, at 980). As this Court has often stated, general rules of this sort "are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977).

2. Appellees focus their constitutional argument, as they did in the district court, on the Takings Clause. They contend that Section 602(a)(38), in conjunction with the pre-existing assignment provision, has the effect of "seizing" the co-resident sibling's child support, transmuting that money into AFDC benefits, and returning the money in the form

of public assistance to the family. Appellees assert that the statutory scheme thus "takes" the child support and uses it to discharge the governmental purpose of assisting the rest of the family, in defiance of the child's supposed state-law right to exclusive use of his money.

As we noted in our opening brief (at 32-33), and as North Carolina explains at greater length in its reply brief, appellees' takings claim fails because its state-law premise is false. A child-support recipient under North Carolina law does not have an absolute property right to unrestricted personal use of those funds. Rather, the child's absent parent has an *obligation* to pay child support, and the child's custodian has an *obligation* to use the money in the best interests of the child. North Carolina law explicitly permits the custodial parent to assign child support for the purpose of securing AFDC benefits, and state law thus contemplates that the best interests of the child can be furthered by an assignment that enables the mother to obtain AFDC for the entire family. Contrary to the premise of appellees' argument, therefore, a mother does not violate her fiduciary duty to her child by assigning his child support to the state, provided she reasonably concludes that the family as a whole will be better off if she does so.

3. Although appellees' Takings Clause challenge lies against Section 602(a)(38), they devote their attention principally to the assignment provision (42 U.S.C. (Supp. III) 602(a)(26)), which was enacted almost ten years earlier. The reason for this is not hard to see. By concentrating on the assignment provision, appellees try to lend color to the idea that the government has taken something away from the child, then returned to him a ratable portion of a family AFDC grant, a portion that is smaller than

the child support given up. In this way, appellees seek to depict a "taking" with an inadequate quid pro quo.[1]

As we explained in our opening brief (at 33-35), this mode of viewing the situation is misguided. The assignment provision itself works no financial detriment to the family. It operates merely as the procedural mechanism by which child-support income is taken into account in determining the family's AFDC eligibility and benefits. The assignment provision does not cause the family's AFDC grant to be any different than it would have been if (1) the family had actually received the child support and (2) the child support had been included in the family's income for purposes of determining the size of its grant. Indeed, the assignment provision can only

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[1] As we have explained (U.S. Br. 12-13, 31), the assignment provision does not apply only to children whose noncustodial parents are actually honoring their child-support obligations. The provision imposes, as a condition of eligibility, that "each applicant" for AFDC must assign to the state "any rights to support * * * which have accrued," and to cooperate with the state in establishing paternity and in obtaining support payments. 42 U.S.C. (Supp. III) 602(a)(26). When Congress amended the statute in 1974, it recognized that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents." S. Rep. 93-1356, 93d Cong., 2d Sess. 42 (1974). In the first ten years following enactment of that provision, legal paternity was established for more than 1.5 million children, more than 3.5 million support orders were established and $6.8 billion in support obligations was collected on behalf of children in AFDC families. 1 Office of Child Support Enforcement, U.S. Dep't of Health & Human Services, *A Decade of Child Support Enforcement 1975-1985: Tenth Annual Report to Congress for the Period Ending September 30, 1985*, at iii, 6, 9-10 (1985).

help the family, not only because it relieves the family of the burden of collecting from the absent parent, but also because it gives the family the benefit of the child support (via an equivalent dollar amount of AFDC benefits) even if the child support is in fact uncollectible.

Under a proper Takings Clause analysis, therefore, the inquiry here should be exactly the same as if there were no assignment provision, and if Congress had simply mandated that child support be included upon receipt as "family income" for AFDC purposes. In that event, the child-support recipient would more easily be seen to "keep" all of his child support, and it would be apparent that Congress had simply determined to cut AFDC benefits to the rest of the family. There surely would be no "taking" under that scenario, since it then could not be argued that anything had been "taken" from the child-support recipient, and since the other family members whose benefits were cut could assert no constitutional entitlement to a permanently-fixed welfare grant. And if there would be no "taking" in the absence of the assignment provision, there cannot rationally be thought to be a taking when the same economic result is produced by the assignment provision's operation.

4. Although appellees naturally craft their argument in terms of child-support income, the logic of their Takings Clause theory would necessarily apply to any sort of income received by the siblings of a needy child. A co-resident minor sibling may have many types of income other than child support. He may have unearned income, such as social security survivors' benefits (see *S. Prt. 98-169*, at 980) or interest on a savings account. Or he may have

earned income from a part-time or full-time job.[2] On appellees' theory, it would be unconstitutional for Congress to require that *any* income of an arguably self-sufficient minor—be it income from a paper route, from shovelling snow, or from working at McDonald's—be counted as "family income" for purposes of determining the family's need for public assistance.

This obviously cannot be the law. Appellees' theory violates common sense, for it ignores the fact, drawn from human experience and recognized by Congress (*S. Prt. 98-169*, at 980), that members of subsistence-level families who live together, who are bound together by close emotional ties, typically regard their income and expenses, their resources and responsibilities, as shared. Appellees' theory, moreover, would disable Congress from enacting any sort of reasonable, needs-based eligibility requirements for the AFDC program. This Court has emphasized that the AFDC program provides for a "*family* grant" (*Dandridge* v. *Williams*, 397 U.S. 471, 477 (1970) (emphasis in original)).[3] No sensible allocation of

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[2] Congress has provided by statute (42 U.S.C. (Supp. III) 602(a)(8)(A)) that most types of earned income of minors is to be disregarded for AFDC purposes, in order to provide an incentive for such individuals to work. That exception, however, is a matter of legislative policy, not constitutional entitlement. In order to understand the logical reach of appellees' constitutional argument, therefore, one may assume for the moment that the statutory exception for earned income had not been enacted.

[3] Appellees assert (Br. 32-33) that "AFDC * * * remains as it was prior to 1984 a statutory scheme which focuses on individuals." As the quotation from *Dandridge* v. *Williams* shows, appellees' characterization of the AFDC program is inaccurate. Indeed, the program's acronym stands for "Aid *to Families* with Dependent Children." See U.S. Br. 6 n.3.

AFDC benefits can be made unless the incomes of the family's members can be considered in determining how large that grant should be.

5. Appellees make two other points that may be answered briefly:

a. Appellees liken Section 602(a)(38) to various "deeming" provisions of the social security laws (Br. 24, 48-49). These provisions "deem" a specified portion of the income of another person who is not seeking AFDC assistance—*e.g.*, a grandparent (42 U.S.C. (Supp. III) 602(a)(39)) or an alien sponsor (42 U.S.C. (& Supp. III) 615)—as being available to an AFDC applicant. Appellees contend that child support, as a matter of state law, is not in fact "available" to the rest of the child's family, and hence that Section 602(a)(38) violates the "availability principle."

Contrary to appellees' contention, this is not a "deeming" case. Section 602(a)(38) requires that the child-support recipient be included in the family filing unit. The child's income is then included in the family's aggregate income for purposes of calculating benefits for the unit, of which he is a part. The child-support income is not "deemed" available to anyone; it *is* available to the child-support recipient, and he *is* a member of the filing unit seeking assistance. The statute is thus completely consistent with the "availability principle."

b. Appellees contend (Br. 85) that the statute "impose[s] on the mother a Sophie's choice, requiring her to choose to sacrifice the financial interests of one child in order to protect the interests of the others." This dilemma is said to follow from the fact that, if the mother refuses to assign the child-support recipient's income to the state, "she and her indigent child will be denied even the absolute necessities required

for survival" (*ibid.*). Amicus ACLU similarly states (Br. 22-23) that a mother's refusal to assign child support results in the whole family's becoming ineligible for AFDC benefits.

These statements are erroneous. As a leading commentator has pointed out, "[a]n applicant who refuses to assign support rights or who does not agree to cooperate in securing support payments will be denied AFDC payments for herself, *but not for her children.*" H. Krause, *Child Support in America: The Legal Perspective* 322 (1981) (emphasis added). The Secretary's regulations specifically provide for that result (45 C.F.R. 232.11(a)(2)), and we understand that North Carolina's practice conforms to this model.

Thus, if a custodial parent with three children (one of whom receives child support, and two of whom do not) applies for AFDC but refuses to assign the child support, the result will be that the family receives assistance as a unit of three (the children only, with the mother being excluded). The three-person unit will then receive an AFDC grant sufficient to bring its income (viz., the child-support income) up to the state's maximum grant level for a unit of that size, and will in addition receive the $50 child-support "disregard" provided by 42 U.S.C. (Supp. III) 602(a)(8)(A)(vi) and 657(b)(1). See U.S. Br. 14.

This hypothetical family, of course, would be better off if the child support had been assigned to the state and the mother had remained in the filing unit, since the family would then be a filing unit of four entitled to a larger AFDC grant. The point is simply that, even if one adopts appellees' proposed method of accounting under which the child-support recipient is viewed as a self-sufficient and autonomous economic unit, that child can "keep" his full child support with-

out necessarily cutting off AFDC assistance to his brothers and sisters. This result demonstrates, once again, that Congress did not take anyone's property when it enacted Section 602(a)(38). Rather, Congress simply cut AFDC benefit levels based on a finding that certain families, because of their members' separate incomes, are less needy than other families whose members do not have any (or as much) such income.

For these reasons and those stated in our opening brief, the judgment of the district court should be reversed and the case remanded with instructions to vacate the injunction and dismiss the complaint and the third-party complaint.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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Nos. 86-509 and 86-564

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

v.

BEATY MAE GILLIARD, *et al.*,

Appellees.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, *et al.*,

Appellants,

v.

BEATY MAE GILLIARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF *AMICUS CURIAE* OF JUVENILE AND FAMILY COURT JUDGES

THOMAS J. MADDEN
Venable Baetjer,
Howard & Civiletti
Suite 1200
1301 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-4300

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BEATY MAE GILLIARD, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of North Carolina

BRIEF AMICUS CURIAE OF JUVENILE AND FAMILY COURT JUDGES

Interest of the Amicus Curiae[1]

The National Council of Juvenile and Family Court Judges is an organization of judges which exists to enhance the quality of judging in the nation's juvenile and family courts. The Council was founded in 1937, and is the oldest and largest judicial membership organization in the country. The Council membership is comprised of judges, referees, commissioners, and masters, all of whom are involved in juvenile or family law. Others active in juvenile or family law may participate in the organization as associate members. NCJFCJ conducts numerous judicial training programs in family law at the national, regional and state levels on a wide range of topics. Programs vary from brief presentations to

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1 Copies of letters of consent to the filing of this brief have been filed with the Clerk.

a full two week course at the National College of Juvenile Justice in Reno, Nevada. The Council also engages in juvenile justice research through the National Center for Juvenile Justice, its research division. NCJFCJ has a number of publications, including the Juvenile and Family Law Digest and the Juvenile and Family Court Journal.

NCJFCJ has an interest in this case because the support a child receives directly affects the quality of the child's life. As judges, we are also deeply concerned that the statute under review has the unintended effect of severely disrupting the process of establishing and enforcing child support obligations for low income families. We wish to explain the basic inconsistency between the principles that govern state child support orders and the AFDC pro-

vision before the Court in this case. We submit this brief in support of the plaintiff class because we believe that implementation of the federal requirement in our states, as construed by the Secretary of Health and Human Services, has resulted and will result in an unprecedented and unwarranted interference with the ability of states and state court judges to establish support orders based on the needs and best interests of the child.

SUMMARY OF ARGUMENT

While there are numerous variations from state to state, two consistent principles govern child support orders throughout the country. First, when a judge sets a child support order, he or she does so based on the needs of that child and the economic abilities of the parent. Second, the parent receiving the child support is obligated to use it for that child.

42 U.S.C. §602(a)(38), as construed by the Secretary of Health and Human Services, is inconsistent with both of these principles of state child support law. Under this provision, when family members wish to apply for AFDC, the child support rights of all family members must be assigned to the state. The support funds of a child are treated as income to all members of the AFDC filing unit,

typically the parent and half-siblings of the child. All but the first $50 of support is retained by the state to reimburse AFDC paid to all members of the AFDC assistance unit. This creates two problems for the judiciary: first, we base child support orders on the needs of the child and not on the needs of other family members; second, the parent receiving a child's support receives those funds as a fiduciary, and may not permissibly treat them as if they were undifferentiated family income.

It is unreasonable for state welfare departments to advise parents to use child support funds for the whole family while state court judges and law prohibit such use. Judges base their orders on the needs and best interests of the child; the federal budgeting rules for the AFDC Program should not operate at cross-pur-

poses with this fundamental goal.

Domestic relations law has been reserved to the states under our constitutional structure. The federal government may not preempt state family law functions unless it does so by direct enactment, and where such preemption is necessary to prevent major damage to clear and substantial federal interests. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); United States v. Yazell, 382 U.S. 341 (1966). Here, there was no direct enactment; 42 U.S.C. §602(a)(38) is cryptic and indirect at best. Further, there are no clear and substantial federal interests which necessitate this major intrusion into the operation of state law and family courts.

ARGUMENT

I. CHILD SUPPORT ORDERS ARE BASED ON THE NEEDS OF THE CHILD AND MUST BE SPENT ON THE NEEDS OF THE CHILD

There are no uniform national standards for setting child support orders, but there are basic similarities throughout the states. A review of state child support standards prepared by the National Institute for Socioeconomic Research for the Department of Health and Human Services observed:

> Domestic relations law is among those areas reserved to the states by the Tenth Amendment of the U.S. Constitution and, as a result, the law of child support consists of separate statutory and common law standards for each state, no two of which are identical. Despite the potential for Balkanization of state support laws and the actual disparity in application of state laws, there is considerable consistency in the principles which are applied in the process of awarding child support.

U.S. Dept. of Health and Human Services, Office of Child Support Enforcement,

Review of Literature and Statutory Provisions Relating to the Establishment and Updating of Child Support Awards, at 12.

The specific formula, if any, used in setting child support orders varies from state to state, and sometimes from judge to judge. However, there are two important constants. First, we are unaware of any jurisdiction where the non-custodial parent's support obligation is increased based on an expectation that he should meet the expenses of other children of the custodial parent. Second, we are unaware of any jurisdiction in which it would be legal for a custodial parent with children from different biological parents to spend one child's support on the needs of the child's half-siblings.

When setting a child support order, the basic factors considered by courts

are the needs of the child, and the respective abilities of the parents. "The chief factors, of course, are the needs of the child and the parents' ability to pay." Douglas, Factors in Determining Child Support, 36 Juvenile and Family Court Journal 27 (1985).

States vary in how they determine the needs of the child. A number of states rely on the criteria set forth in the Uniform Marriage and Divorce Act, and accordingly consider the financial resources of the child; the standard of living the child would have enjoyed had the marriage not been dissolved; and the physical and emotional condition of the child and his educational needs. 9A U.L.A. §309; Review of Literature, supra, at 13-14. In other states, a dollar figure is determined for the minimum needs of the children a non-cus-

todial parent is obligated to support, and a formula is applied to determine whether the non-custodial parent can meet or surpass that minimum level. Williams, Development of Guidelines for Establishing and Updating Child Support Orders (Interim Report), Office of Child Support Enforcement, U.S. Dept. of Health and Human Services (1985), at 53-55. Wisconsin offers a third example, in which the state does not examine the child's individual needs, but instead bases child support orders on the gross income of the obligor and the number of children to be supported by the obligor. Williams, supra, at 59. In none of these approaches are the needs of the child to be supported elevated based on the presence of half-siblings or other persons living with the child.

States also vary in how they deter-

mine the respective abilities of the parents. They may base their determinations on gross or net income, may or may not give consideration to earnings capacity, may or may not allow for other deductions (e.g., day care expenses, medical costs), and may or may not require that the support obligation to existing children take priority over the need to support subsequent children. Id., at 38-52.

Sometimes, a custodial parent has children from more than one non-custodial parent. This may occur when the custodial parent has remarried, or has had one or more children out of wedlock. For example, consider a mother with two children from different marriages. In a dissolution, what measure should be used to set the father's child support? In this situation, we are aware of no juris-

diction that treats the father as if he must support both children. Some jurisdictions, when determining the relative abilities of the parties, consider the fact that the mother has two children to support, and so her resources to support the child of the marriage are diminished. This may indirectly result in a somewhat higher support order for the father than would be the case if the mother's other child were not present. However, recognizing the impact of other children on the custodial parent's resources is very different from basing a support order on an expectation that the non-custodial parent should contribute to the needs of those children.

The considerations in setting the amount of the child support order are integrally related to the court's expectation for how the funds will be

spent. A court expects that a support order for a child will be spent on the needs of that child. That is the fundamental premise in setting the order. We do not realistically expect parents to apply accounting principles to their daily household expenses. However, we do expect that the support funds will go for current and future needs of the child in whose name the order is made. Courts have typically described the duties of the custodial parent as being in the nature of the duties of a trustee receiving funds for the benefit of the child beneficiary. See, e.g., Goodyear v. Goodyear, 275 N.C. 374, 379, 126 S.E.2d 113, 117 (1962); Ditmar v. Ditmar, 48 Wash. 2d 373, 374, 293 P.2d 759, 760 (1956); Corbridge v. Corbridge, 23 Ind. 201, 206, 102 N.E.2d 764, 767 (1952); Thomas v. Holt, 209 Ga. 133, 134, 70

S.E.2d 898, 897 (1952).

The federal government's brief in this case acknowledges the principle that child support payments are for the benefit of the child, but offers an unduly expansive view of which expenditures can be considered for the benefit of the child. The federal government suggests that because a parent exercises discretion in determining how to use child support funds, the parent is free to use them for "shared expenses" of the family. Fed. App. Br. at 32-33.

Certainly it is permissible and appropriate for a parent to use a child's support funds for his or her share of family expenses. It is not permissible for a parent to use one child's support to pay everyone else's share. If a family resides in a four bedroom house, the parent cannot justify paying the

entire mortgage payment from a child's support merely because housing is a "shared expense." Rather, a parent must exercise a fiduciary's judgment in use of the funds,' and not treat the child's funds as his or her own.

The federal government also suggests that such items as transportation and clothing are ordinarily regarded as shared expenses. Fed. App. Br. at 33. This is also inaccurate. It is difficult to see how a court could construe a parent's expenditure of one child's support to purchase a bus pass or clothing for the half-sibling of the child as a legitimate use of the funds for a "shared expense."

It may be somewhat imprecise to describe a child's right in terms of either "exclusive use" or "unrestricted access," but the District Court in this

case has accurately described the basic limitations governing a parent's use of a child's support. The proper approach is to recognize that the child support funds belong to the child rather than the parent, and that while a parent will exercise discretion in determining how they are spent, that discretion must be exercised by applying the standards generally applicable to fiduciaries.

II. 42 U.S.C. §602(A)(38), AS CONSTRUED BY THE SECRETARY OF HEALTH AND HUMAN SERVICES, SUBSTANTIALLY INTERFERES WITH THE OPERATION OF STATE CHILD SUPPORT LAW.

As construed by the Secretary of Health and Human Services, 42 U.S.C. §602(a)(38) requires that when an application for Aid to Families with Dependent Children assistance is made for a child, the application must include all of the child's siblings living in the home. If one child receives child sup-

port, those funds are assigned to the state as a condition of the family receiving aid. The first $50 of child support paid each month is passed on to the custodial parent for the child, but all child support paid in excess of $50 is retained by the state to reimburse aid paid for the AFDC filing unit. The funds are not only used to reimburse the child's pro rata share of the AFDC grant, but they are also used to reimburse the AFDC payment made to everyone in the AFDC filing unit. So long as the child support amount paid is not large enough to make the filing unit ineligible for AFDC, all of the child support paid in excess of $50 goes to reimburse the state rather than meet the needs of the child.

An example will help illustrate our concern about the inconsistency between this provision and state child support

law. Suppose the AFDC grant for a three person assistance unit is $400/month, and the AFDC grant for a four person unit is $500/month. Suppose Mr and Mrs. Smith are getting divorced, they have one child, and Mrs. Smith has two children from a prior marriage. As often is the case at the time of divorce, suppose Mrs. Smith has no source of income. How should a court determine Mr. Smith's child support obligation?

Before enactment of the Secretary's regulations purporting to implement 42 U.S.C. §602(a)(38), the court could approach the case like any other child support case: the judge would consider Mr. Smith's income and capacity for income; Mrs. Smith,s income and capacity for income; and the needs of the Smith child. If the court ordered child support of $250/month, the court would

expect those funds to be spent for the Smith child. If Mr. Smith had more income, or the Smith child had special needs, and an order of $300/month were made, the court would expect the additional amount to still go to the needs of the Smith child. The court would consider the funds misspent if, for example, Ms. Smith used them to pay for clothing or schooling needs of her other children.

The application of the Secretary's regulations purporting to implement 42 U.S.C. §602(a)(38) substantially alters the effect of the support order. Now, if the court orders child support of $250/ month, Ms. Smith will receive $250/ for the Smith child, and the remainder of the funds will be used to reimburse the state for AFDC paid for the Smith child and other family members in the AFDC unit.

The Smith child's pro rata share of the AFDC grant is $125 (1/4 of $500), so the child support paid in excess of that amount is retained by the state to reimburse the AFDC payment for other family members.

If the court orders child support of $300/month, Ms. Smith will still receive $50 for the Smith child, and the remainder of the support will still be used to reimburse the state for AFDC paid to the filing unit. The increased amount of the court order does not result in more support for the Smith child; it only increases the amount of Mr. Smith's support which goes toward reimbursing the state for AFDC paid for the other family members. Whichever amount Mr. Smith pays, the AFDC unit will still receive the same AFDC payment of $500. Whether or not Mr. Smith pays any support, his child will

still receive a pro rata share of the AFDC grant. However, the only way for the Smith child to get more than $50 benefit from his father's support is for the court to order a child support payment large enough to make the entire family ineligible for AFDC.

In this situation, an increase in child support will often provide no benefit whatsoever to the child. Whether the father pays $250 or $300, the child will have the same income: the child will receive a pro rata share of the AFDC grant, and $50 of the child support will be passed through to Mrs. Smith for the Smith child. Thus, when the court sets child support, in effect it is simply deciding how much Mr. Smith must reimburse the state for AFDC paid to his child and to everyone living with his child who is in the AFDC unit.

Suppose Mr. Smith would be willing or able to pay a greater child support sum, because his child has special educational or medical needs. Under 42 U.S.C. §602(a)(38), as construed by the Secretary, an increased child support order cannot be directed to the child's special needs, because the increased order only results in reimbursing the state for AFDC paid to other family members. For all practical purposes, the provision forecloses a court from directing or permitting a non-custodial parent to pay additional support for additional needs of the child.

The resulting structure is manifestly unfair to both the child and the non-custodial parent. Its destructive efforts go beyond the reduction in direct support to affected children. In addition to its economic function, child

support provides a critical bond between a child and non-custodial parent after divorce. No enforcement tool is as effective as a parent's desire to support his child. When a parent wants to pay support for his child, but discovers that the funds paid will primarily be used to reimburse the state for children other than his own, the parent's incentive to pay is substantially diminished. State enforcement techniques may minimize the actual loss of funds where parental incentive is lost, but those techniques cannot repair the damage to the parent-child relationship.

Even if the court would wish to make a non-custodial parent support the entire family in which his child lives, the court is not free to do so. Largely under the impetus of the Child Support Enforcement Amendments of 1984, p.L. 98-

378, states have been moving toward the use of guidelines which specifically prescribe the factors that may be considered when a court sets a child support order. 42 U.S.C. §667. We are not aware of any state guidelines under which a court is free to set a higher level of support than would otherwise be justified merely because a child is a voluntary or involuntary member of an AFDC assistance unit.

The interaction of state child support guidelines and 42 U.S.C. §602(a)(38), as construed by the Secretary, creates an utterly untenable situation for the judiciary. Under the provision, the AFDC eligibility status of the other members of the child's family and the total AFDC payment amount for all family members become the critical factors in determining whether or not

child support funds will be actually received by the child. Under state child support standards, we can give no consideration to these factors when setting child support orders.

The difficulty is exacerbated because of the limitations on permissible use of a child's support funds. Suppose in the Smith's example that Mr. Smith has sufficient income to justify a $600/month child support order. If the court makes a $600/month child support order, it will make the assistance unit ineligible for AFDC. But the unit has no other income. If Mrs. Smith treats the $600/month designated for the Smith child as ordinary income for herself and her other child, she has breached the terms and expectations of state law and the child support order. It is inconsistent with her fiduciary duties for her to spend

those funds on the needs of persons other than the Smith child. Yet if she does not do so, she and her other child will have no income at all.

It is untenable to have a situation where the state court judge explains to Mrs. Smith that she must use the support for the Smith child for that child alone, while the state welfare department tells her she is free to use the funds for any family member. Yet the operation of 42 U.S.C. §602(a)(38), as construed by the Secretary, effectively compels state welfare agencies to provide such advice, in direct contravention of state judicial orders.

The state's brief to this Court does not recognize the inconsistency between 42 U.S.C. §602(a)(38), as construed by the Secretary, and the law of child support, because it contends that a

parent as trustee could decide that it was in the best interest of her child to apply for AFDC for the entire family. State. App. Br. at 13. It explains three reasons that a parent might make that decision: that a steady source of AFDC would be preferable to erratic or unpaid child support; that AFDC receipt would provide automatic eligibility for Medicaid; and that the standard of living of the family in which the child lives would be enhanced. State App. Br. at 13.

The difficulty with the state's argument is that it does not acknowledge that the best interests of the child are sometimes different from the best interests of the people living with the child. The first two reasons offered by the state - a steady source of income, and eligibility for Medicaid - may well be advantageous to the child. A parent

as trustee might reasonably wish to assign the child's support rights in order to receive these benefits. Under prior law, when a parent was able to choose whether to apply for AFDC for a child based on the best interest of the child, parents typically could and did base their decisions on whether the child would receive a benefit from being a part of an AFDC unit.

However, the third reason offered by the state - that AFDC application may raise the standard of living of the family - seems to disregard the fact that the increased living standard for other family members comes at the expense of a decreased living standard for the child. A parent as trustee cannot justify assigning a child's support rights to the state merely because the parent could obtain a source of income for her other

children by making the assignment.

The state's example demonstrates the problem that the provision creates for a parent of a child living with half-siblings. The state seems to suggest that the parent look at uses of the funds from a total family perspective. The child support order is not based on a total family perspective, and it is not permissible to use the child support funds as if they were income for the total family. Nevertheless, under the provision, the parent can only receive AFDC for the half-siblings by assigning to the state the child support rights of the child who does not need AFDC. This creates a direct conflict between the parent's duty as trustee of child support funds and the parent's need to find a source of income for the other children. In practice, it compels the parent to

sacrifice one child's rights for the other childrens' needs. Necessarily, it undermines the ability of parents to comply with the terms of state child support orders and law.

III. 42 U.S.C. § 602(A)(38) MUST BE CONSTRUED IN A MANNER THAT DOES NOT PREEMPT STATE CHILD SUPPORT LAW.

On prior occasions, this court has refused to construe federal law affecting state family law in a manner that pre-empts the state law provisions. In United States v. Yazell, 382 U.S. 341, 352 (1966), the Court explained: "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements."

We have considerable doubt as to whether Congress could, consistent with principles of federalism and its enumerated powers, pre-empt the basic stan-

dards governing state child support law. The court need not reach that issue in this case, because the Congressional enactment under consideration here clearly does not meet the established standards for a finding that a Congressional attempt to pre-empt state law has occurred.

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) offers a two part test for determining whether federal law should be construed to preempt state family law. The first consideration is whether Congress has "positively required by direct enactment" that state law be pre-empted. 439 U.S. at 581, quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904). The second consideration is that "[s]tate family and property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy

Clause will demand that state law be overridden." 439 U.S. at 581, quoting United States v. Yazell, 382 U.S. 341, 352 (1966).

Neither prong of the Hisquierdo test is satisfied here. First, the conflict between the federal construction and state law is not one resulting from "direct enactment" of conflicting federal legislation. In an area historically reserved for the states, and so central to the very operation of state government, the Court should not find preemption by implication absent clear legislative intent. In Hisquierdo, the Court found "direct enactment" where the anti-assignment provision of the Railroad Retirement Act, 45 U.S.C. §231m, provided:

> Notwithstanding any other law . . . of any State, . . . no annuity or supplemental annuity shall be assignable or be subject to any tax

> or to garnishment, attachment, or other legal process under any circumstances whatsoever. . ."

439 U.S. at 576. A finding of preemption was appropriate where the Congressional language was unequivocal in declaring that the provision was to govern, notwithstanding state law.

In contrast, neither the language nor the legislative history of Section 602(a)(38) reflect any Congressional awareness that the statute would conflict with state child support law, and they certainly do not manifest Congressional intent to preempt state child support law. Section 602(a)(38) makes no reference to child support, and offers no statement as to how to resolve conflicts arising from inconsistencies with state child support law. The statutory language does not, by its terms, mandate that a child receiving child support be

compelled to be in an AFDC assistance unit or assign the child support rights to the state. The legislative history, as described by both the District Court and the federal government (J.S. App. 43a-50a, Fed. App. Br. at 27-28) indicates that there were several brief references to child support in an exceedingly brief legislative history. None of these references give any reason to believe that Congress was aware of the conflict that could arise from implementation of Section 602(a)(38), or that Congress wished to resolve the conflict by preempting state child support law.

There is a further indication that the federal government has not considered the conflict between 42 U.S.C. § 602(a)(38), as construed by the Secretary, and state child support law. The materials

and publications of the Department of Health and Human Services have advocated, and continue to advocate, child-based determinations in setting child support orders. For example, HHS has promulgated regulations setting forth mandated criteria for a state to apply in setting support obligations for a non-custodial parent whose child is receiving AFDC. 45 C.F.R. §302.53. These criteria are to be applied when there is no court order for support. 45 C.F.R. §302.53(a). The criteria provide, in part, that the state must consider "the needs of the child for whom the support is sought" and "the amount of assistance which would be paid to the child" under the state's AFDC plan. 45 C.F.R. §302.53(a)(5), (6). Nothing in the criteria directs states to consider the needs of the child's family or the amount of aid being paid for the

child's family.

Similarly, the Department of Health and Human Services has published materials offering guidance to the judiciary in child support enforcement proceedings. Henry and Schwartz, A Guide for Judges in Child Support Enforcement (2nd Ed.), U.S. Department of Health and Human Services, Office of Child Support Enforcement. In the course of its comprehensive discussion of the Establishment of Support Obligations (pp. 51-78), the publication considers a range of approaches to setting child support amounts, but never suggests that an appropriate approach would be to consider the needs of a child's half-siblings or other family members. We are unaware of any publication or other communication from the Department of Health and Human Services offering any information to

state judges as to how to set child support orders in light of 42 U.S.C. §602(a)(38).

In short, we are aware of no evidence that Congress or the Department of Health and Human Services contemplated the conflict between Section 602(a)(38) and state child support law, and we are certainly aware of no evidence that Congress intended by "direct enactment" to preempt state child support law in this area.

The second part of the Hisquierdo test focuses on whether there would be "major damage" to "clear and substantial" federal interests if the federal statute were construed in a manner that did not effect a preemption of state family law. 439 U.S. at 581. The federal interest, as stated by the Secretary of Health and Human Services, appears to be that of

reducing federal expenditures and targeting assistance to the neediest families, by recognizing the reduced needs of persons who share expenses with family members who have their own source of income. See Fed. App. Br. at 9-10. This goal can be attained without preempting state child support law. It is surely possible to adopt budgeting rules that reflect economies of shared expenses, but which do not compel parents to spend the support of one child on the needs of the child's half-siblings. See Baldwin v. Ledbetter, 648 F.Supp. 623, 639 (N.D. Ga. 1986), direct appeal docketed, No. 86-1140 (Jan. 9, 1987), stay pending appeal granted, No. A-448 (Dec. 18, 1986) (Powell, C.J.). A more narrowly drawn provision can readily achieve the Congressional goal without overturning the foundations of state

child support law.

The Court should hold that Section 602(a)(38), as enacted, does not preempt the strictures of state child support law. The Court should accordingly hold that, where state child support law prohibits a parent from spending a child's support on the needs of his or her half-sibling, Section 602(a)(38) may not be construed to require inclusion of the supported child in the AFDC filing unit.

Until now, states have based child support determinations on the needs of the child rather than the needs of the persons with which the child lives. If the standard is to be changed, the legislatures of the states should be allowed to consider the merits and demerits of alternative approaches. When Congress enacted the Child Support Enforcement

Amendments of 1984, it declined to impose a single set of standards on the states for setting child support orders; instead, it directed each state to determine its own guidelines, based on the conditions and needs of the states. 42 U.S.C. §667. The federal encouragement to set guidelines, while allowing states to determine their own appropriate guidelines, is consistent with the principles of comity which govern our federal system.

In contrast, the ability of states to set and enforce their own guidelines is undermined by the imposition of a federal requirement that support orders be treated as undifferentiated family income when family members need public assistance. This is an unprecedented, unjustified and unwarranted intrusion into the decisions of the states and the

operation of state family courts.

CONCLUSION

The ability of state court judges to base child support orders on the needs and best interests of a child is at the very heart of state family law. Section 602(a)(38), as construed by the Secretary, makes it impossible for state judges to perform this role when family members need AFDC. In those cases, it alters the process of setting an order from one focused on the needs of the child to one in which the court merely orders a parent to reimburse the state for AFDC assistance paid for the child and the other persons living with the child. It effectively prevents state courts from ordering or allowing parents to provide for the education and special needs of their children whenever the children live with relatives who have

applied for AFDC assistance. It effectively prevents a parent from supporting his child unless he also supports the half-siblings of the child.

In enacting Section 602(a)(38), Congress manifested no intent to disturb or preempt state child support law. The Court shoud find that there has been no preemption, reject the Secretary's construction of the statute, and affirm the order of the District Court.

Respectfully submitted,

THOMAS J. MADDEN
Venable Baetjer,
Howard & Civiletti
Suite 1200
1301 Pennslyvania
Ave., N.W.
Washington, D.C. 20004
(202) 662-4300

(7) (9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,
Appellant,

—v.—

BEATY MAE GILLIARD, *et al.*,
Appellees.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, *et al.*,
Appellants,

—v.—

BEATY MAE GILLIARD, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF OF *AMICI CURIAE*

NOW Legal Defense and Education Fund;
J. Joseph Curran, Jr., Attorney General of Maryland;
Association for Children for Enforcement of Support;
Center for Constitutional Rights;

(List of *Amici* continued on inside front cover)

SALLY F. GOLDFARB
Counsel of Record
ALISON WETHERFIELD
SARAH E. BURNS
MARSHA LEVICK
NOW Legal Defense
and Education Fund
99 Hudson Street
New York, New York 10013
(212) 925-6635

95PP

Center For Law and Social Policy;
Child Support Action Network;
Connecticut Women's Educational and Legal Fund;
Custodial Advocates Seeking Enforcement of Child Support;
Equal Rights Advocates, Inc.;
National Association of Social Workers;
National Conference of Black Lawyers;
National Council of Jewish Women;
Northwest Women's Law Center;
Parents Against Non Support;
Parents Organized for Support Enforcement, Inc.;
Parents Without Partners;
People Organized for Support Enforcement;
Single Parents United 'N' Kids;
Sisterhood of Black Single Women;
Women's Equal Rights Legal Defense and Education Fund;
Women's Equity Action League;
Women Employed;
Women's Law Project;
Women's Legal Defense Fund

IN SUPPORT OF APPELLEES

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INTERESTS OF AMICI CURIAE

As described in detail in the attached appendix,[1] amici curiae are diverse entities with a shared interest in the well-being of needy families in this country, particularly low income families headed by one adult and receiving Aid to Families with Dependent Children.[2] Amici are deeply concerned by the effect that the statute and regulations challenged in this action are having on children in low income

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[1] The interests of amici are set forth in detail in the attached appendix to this brief. Pursuant to Rule 36.2 of the Rules of this Court, amici file this brief with the consent of all parties. Letters of consent are being filed with the Clerk of the Court.

[2] Approximately 90 percent of all children living in single parent families in this country are living with their mothers. Bureau of the Census, U.S. Dep't of Commerce, Population Characteristics Services, Household and Family Characteristics: March 1985, Current Population Reports, Series P-20, No. 411, at 11, Table G (1986).

families, who are being deprived of the full benefit of their child support income from an absent parent.

Amici are concerned with child support issues because they recognize that the shortfall of child support income is a key cause of child poverty.[3] It is also an important cause of poverty among women; when non-custodial parents fail to accept continuing financial responsibility for their children or the full amount due fails to reach those children, a disproportionate financial burden falls upon custodial parents -- who are overwhelmingly women.

STATEMENT OF THE CASE

Amici curiae hereby adopt and incor-

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[3] Amicus curiae J. Joseph Curran Jr., Attorney General of Maryland, has the particular concern that the federal regulations at issue require his state to disrupt and undermine its own orderly child support scheme.

porate by reference the Statement of the Case in the brief for appellees.

SUMMARY OF ARGUMENT

42 U.S.C. § 602(a)(38) (Supp. III 1985), is a complex provision. It requires states, when making a determination of whether a particular "dependent" child is in "need" for the purposes of eligibility for Aid to Families with Dependent Children (AFDC) payments, to consider the existence in the same household of certain blood-related or adoptive siblings of the dependent child. States must also consider the income, resources and needs of these siblings of the dependent child. This procedure, properly understood, reduces AFDC benefits paid to dependent children wherever non-needy siblings living in the same household have income <u>which is available to the dependent children</u> to reduce their need for AFDC payments. North

Carolina law, which was not preempted by § 602(a)(38), greatly restricts the availability of child support income; it can only be made available in any measure to siblings of the supported child where to do so, in the custodial parent's opinion, is in the best interests of the supported child.

Appellants have relied on incorrect interpretation of the language of § 602(a)(38) to justify promulgating regulations known as the standard filing unit regulations. These regulations attempt to circumvent the law that child support income is not generally available to the supported child's needy siblings, for whom the supported child has no financial responsibility. The regulations further violate Congressional intent by requiring all independently supported children living with needy siblings to apply for AFDC and

to assign away their child support rights, thus depriving these children of the full benefit of their child support income.

This unfortunate situation was never intended by Congress, as is clear on examination of the language and legislative history of the Social Security Act, of which § 602(a)(38) forms part. The 98th Congress, in the same session that saw the enactment of § 602(a)(38), demonstrated, in other amendments to the Social Security Act, an intent to reduce the number of children deprived of their rightful support from absent parents. Congress did not intend to carve out an exception to this protection by depriving children of child support income if they live with needy siblings.

This Court should accept the arguments of appellees and amici curiae as to the correct interpretation of § 602(a)(38).

The interpretation urged by appellants is not only unsound as a matter of statutory interpretation, but also presents constitutional infirmities. Basing the right of a child to receive the full benefit of his or her child support income on whether or not his or her siblings are needy is a violation of the equal protection components of the fifth and fourteenth amendments. Classification of a child by his or her membership of a particular type of disadvantaged family withstands neither "heightened" scrutiny nor "rational relationship" scrutiny.

I. IN INTERPRETING § 602(a)(38) TO REQUIRE THE PROMULGATION OF THE STANDARD FILING UNIT REGULATIONS, APPELLANTS HAVE MISINTERPRETED THE LANGUAGE AND LEGISLATIVE HISTORY OF THE SOCIAL SECURITY ACT

Appellants Bowen and Kirk respectively head the federal and North Carolina agencies which together administer the AFDC program in North Carolina.[4] Since 1984, when the 98th Congress in its second session added § 602(a)(38) to the codified Social Security Act,[5] both agencies have issued regulations governing AFDC application procedures, purportedly implementing § 602(a)(38).

These post-DEFRA regulations, known as the standard filing unit regulations,

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[4] The AFDC program is a nationwide program to alleviate the problems of child poverty, established by subch. IV, pt. A of the codified Social Security Act of 1935, as amended, 42 U.S.C. §§ 601-615 (1982 & Supp. III 1985).

[5] Deficit Reduction Act (DEFRA), Pub. L. 98-369, § 2640(a), 98 Stat. 494, 1145 (1984).

affect needy households in three discrete ways. First, appellants now require that when a claim for AFDC is made on behalf of a needy child, all income, including child support income, of any blood-related or adoptive minor brothers and sisters living with the child must be treated as available to the needy child, reducing his or her needs and thus also reducing any potential AFDC payments.[6]

Second, appellants require that all blood-related or adoptive siblings of a needy child applying for AFDC must also apply for AFDC, regardless of their individual wishes and needs.[7]

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[6] 45 C.F.R. § 233.20(a)(2) (1986) (all types of income of applicants to be taken into consideration); Section 2360 (V)(A)(1), North Carolina 1985 AFDC Manual.

[7] 45 C.F.R. § 206.10(a)(1)(vii)(B) (1986); Section 2360 (III)(A), North Carolina 1985 AFDC Manual.

Third, if the household's income is low enough to qualify all applicants for AFDC benefits, federal and North Carolina regulations require that the applicants assign all rights to child support income to the North Carolina Department of Human Resources.[8] These child support assignment regulations existed before DEFRA to deal with the child support income of children voluntarily applying for AFDC. Under the practices challenged in this case, these same regulations are extended to siblings of these children, who do not need or want AFDC. Although $50 of the total amount of support collected on behalf of children in the family is returnable to the family per month,[9] a child required to apply for AFDC

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[8] 45 C.F.R. § 232.11(a)(1) (1986); Section 2365 II, North Carolina State 1985 AFDC Manual.

[9] 42 U.S.C. § 657(b)(1) (Supp. III 1985).

by the standard filing unit regulations is deprived of that part of his or her support income which exceeds his or her share of the $50 and the AFDC grant.[10]

(A) Appellants Have Erred In Treating The Child Support Income of Children Who Do Not Need AFDC As "Available" Income in Assessing AFDC Eligibility And Calculating AFDC Payments Of Their Needy Siblings

Section 602(a)(38) does not provide that state AFDC agencies must consider the child support income received by non-needy children as available to spend on their

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[10] In this case, for example, before the post-DEFRA North Carolina AFDC regulations came into effect, Aaron and Bernard Williams each received $100 per month in child support income. After they were required to apply for AFDC payments as a condition of eligibility for AFDC of their siblings Allen, Andre and Alise Waters, their total combined income dropped to $146 per month. Affidavit of Arvis Waters, Joint Appendix (J.A.) at 63-65. See Gilliard v. Kirk, 633 F. Supp. 1529, 1543 (W.D.N.C. 1986). This figure may overestimate their income if the $50 of their child support returned to the family is divided among all the children and not just between Aaron and Bernard.

needy siblings, thus reducing any AFDC payments to the latter. It provides that states must be aware of the existence and economic status of minor adoptive and blood related siblings living in the same household as child applicants for AFDC.[11] This

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[11] § 602(a)(38) states, in pertinent part, that a state AFDC plan must provide:

> that in making the determination under paragraph (7) <u>with respect to a dependent child</u> and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include -
> ...
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such... brother, or sister is living in the same home as the dependent child, and <u>any income of or available for</u> such ...brother, or sister shall be included in making such determination and applying such paragraph <u>with respect to the family</u> (notwithstanding Section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter)..."

42 U.S.C. § 602(a)(38) (emphasis added).

knowledge must then be applied in two ways in assessing the AFDC eligibility and calculating the AFDC payments of the child applicants.[12]

First, "with respect to a dependent child" the state agency is directed to include minor brothers and sisters living in the same household as the child in

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[12] North Carolina operates a two part procedure pursuant to 42 U.S.C. §§ 602 (a)(7) and (8)(Supp. III 1985) in determining eligibility and payment size. There is a state-set monthly monetary "need standard" per individual applying for AFDC. If the monthly gross income of those applying for AFDC exceeds 185% of the combined need standard for the number of individuals applying, no AFDC is payable. If the applicants have a sufficiently low income to pass this eligibility test, the AFDC payment is calculated by subtracting their monthly "countable net income" (i.e., income after disregarding certain types and amounts of income set out in 42 U.S.C. § 602(a)(8)) from the state-set "payment standard", which is 50% of the combined need standards for that number of individuals. The resulting sum is paid to the AFDC recipients. See generally, J.A. at 51-53; Section 2360, North Carolina AFDC 1985 Manual (explanation of AFDC application procedures).

making the eligibility and payment assessments required by 42 U.S.C. §§ 602(a)(7) & (8). In North Carolina the "need" of an individual child varies in money terms depending on the size of the household in which he or she lives. The larger the size of the household is, the smaller the individual "need standard" and "payment standard" (which is half of the need standard), to reflect economies of scale in larger households. See J.A. at 51-53. Section 602(a)(38) requires that North Carolina base its assessment of eligibility and payment size on individual need and payment standards which reflect not just the number of children and caretaker relatives applying for AFDC, but also the number of independently supported children

not applying for AFDC in the household.[13] In this way the economies of scale produced by the presence in the household of a child who does not need AFDC are taken into account.[14]

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[13] Thus in a six person household, in which two children are independently supported, and the other three children and caretaker relative apply for AFDC, the four individual applicants could be assessed using unit need and payment standards reached by multiplying the six-person household individual standards (which are lower than the four-person household individual standards) by four.

[14] The DEFRA conference report explaining § 602(a)(38) to the 98th Congress specified that the section would end the practice under "present law" (pre-DEFRA) whereby those applying for assistance might exclude from the AFDC assessment "certain family members who have income which might reduce the family benefit." By including these members in the filing unit for the initial selection of the appropriate individual need and payment standards, the family benefit is immediately reduced. H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad. News 1445, 2095. Appellants' mistaken belief that being included in the "filing unit" means being an applicant or recipient of AFDC, actually increases benefits paid out to families, as

Second, "with respect to the family," § 602(a)(8) directs state agencies to include "any income of or available for such brother, or sister" in making the eligibility and payment assessments.[15] As explained in note 12, supra, North Carolina assesses applicants for AFDC as a unit, using aggregated need and payment standards based on the number of individual applicants and non-applicant parents and siblings in the household. Section 602(a)(38) directs the North Carolina AFDC agency to deduct from the unit's payment standard "any income of or available for"

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more people are required to receive benefits.

[15] The income of these minor siblings is thus taken into consideration as the income of "any other individual (living in the same house as such child and relative [claiming AFDC]) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid." 42 U.S.C. § 602(a)(7).

the independently supported siblings who do not need AFDC.

The phrase, "any income of or available for" has, however, been misconstrued by appellants to mean all income of the siblings of AFDC child applicants,[16] including legally restricted child support income. This interpretation blatantly disregards a profusion of cases establishing that the availability of certain types of legally restricted income for the purposes of §§ 602(a)(7) & (8) assessments is limited. See, e.g., Owens v. Heckler, 753 F.2d 675 (8th Cir. 1985) (HHS could not reduce a family's AFDC grant by the amount of Social Security extended student benefits received by a student and actually needed for educational expenses); Hayes v.

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16 45 C.F.R. § 233.20(a)(2) (1986); Section 2360(V)(A)(1), North Carolina 1985 AFDC Manual.

City University of New York, 503 F. Supp. 946 (S.D.N.Y. 1980), aff'd, 648 F.2d 110 (2d Cir. 1981) (state cannot treat federal and state educational assistance that cannot actually be used to pay the everyday costs of living as available income).

Congress can, of course, limit the application of the availability principle, but in the absence of explicit Congressional action, the availability principle must be observed, as this Court noted as recently as 1985. This Court stated then that "[this] Court's cases applying the [availability] principle clearly reflect that its purpose is to prevent the states from relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need". Heckler v. Turner, 470 U.S. 184, 201 (1985) (emphasis

added).[17] Where Congress has not specifically displayed an intent to cut back on the extent of the principle, it continues to govern interpretation of the Social Security Act. Cf. id. at 210 (intent to cut back on availability principle as applied to mandatory tax withholdings evinced by Congress in 1981).

It had been well established for many years before the enactment of § 602(a)(38) that child support income, which is restricted by law in North Carolina and other states to the use and benefit of the supported child, is not income generally

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[17] See also, e.g., Van Lare v. Hurley, 421 U.S. 338 (1975) (state may not reduce the shelter allowance provided to AFDC recipient when a non-paying lodger resides in the home); Lewis v. Martin, 397 U.S. 552 (1970) (state may not reduce AFDC assistance by considering the income of "male person assuming the role of spouse"); King v. Smith, 392 U.S. 309 (1968) (state may not assume that man living with child's mother is a "substitute father" who meets child's needs).

available for § 602(a)(7) and (8) assessments of the need of other siblings within the same family.[18] This Court itself affirmed that principle at an earlier stage in this case fifteen years ago.[19]

Where, as in North Carolina, children are not legally responsible for the support of their needy siblings, child support income is ordered to meet a particular child's reasonable needs, not those of siblings by another absent parent.[20] The

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[18] See Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); Bourque v. Commissioner of Welfare, 6 Conn. Cir. Ct. 685, 308 A.2d 543 (1972); Scott v. Commonwealth Dept. of Public Welfare, 46 Pa. Commw. 403, 406 A.2d 594 (1979); Sledge v. Commonwealth Dept. of Public Welfare, 43 Pa. Commw. 553, 402 A.2d 1130 (1979).

[19] Gilliard v. Craig, 409 U.S. 807 (1972), aff'g. 331 F. Supp. 587 (W.D.N.C. 1971).

[20] In North Carolina, child support orders are issued to "meet the reasonable needs of the child for health, education, and maintenance, having due regard to the

child support is payable to the custodial parent for the benefit of the child.[21] While the custodial parent, acting as a trustee of the child support income, may indirectly benefit from the child support income (e.g., by renting a home with the support money that houses both the child and the custodial parent), that parent may not personally profit by using the funds for others, such as the supported child's needy siblings. This does not mean that child support income must be spent exclusively on items that only the supported child may use. The money must be spent in the child's best interests, however, which

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estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case" N.C. Gen. Stat. § 50-13.4(c) (1984) (emphasis added).

[21] N.C. Gen. Stat. § 50-13.4(d) (1984).

principle would certainly preclude the custodial parent from diverting the funds to meet expenses incurred solely by her other children. Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962).

Appellants take the somewhat confusing simultaneous positions that § 602(a)(38) abolishes the availability principle insofar as the availability of child support income is concerned, but that even so, the child support income is automatically used to the supported child's benefit when considered available to his or her needy siblings. Brief for federal appellant at 26, 38-39; brief for [state] appellants at 13. Both of these arguments are faulty.

The standard filing unit regulations require child support income of minor siblings in the same household as needy children to be treated as income available

to spend on the needy children, and countable in reducing their AFDC payments. In fact, while § 602(a)(38) provides that AFDC payments should be reduced to reflect the economies of scale produced by the presence in the household of children who do not need AFDC, it certainly does not require that AFDC payments should be further reduced by the amount of child support received by these children. As detailed in Section I(D), infra, the 98th Congress never suggested that a child's right to child support from an absent parent is balanced by a duty to spend that money on his or her needy siblings, as the standard filing unit regulations imply. Neither the conference report commending the DEFRA bill to both Houses of Cong-

ress,[22] nor the language of § 602(a)(38) itself, make any reference to child support income. Had Congress intended to mandate states to ignore judicial authority, including Supreme Court authority concerning the "availability" of child support income, the conference report would surely have pointed this out.[23] It is instructive

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[22] H.R. Conf. Rep. No. 98-861, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad. News, 1445 et seq.

[23] Federal appellant's interpretation of an excerpt from Senate Finance Committee discussions early in the consideration of DEFRA, which the federal appellant contends proves that Congress intended to mandate consideration of child support as available income, is not convincing. (Brief for federal appellant, at 27). In that excerpt, child support income is referred to as income "which might reduce the family benefit." This was obviously an uninformed preliminary discussion, given the conclusory nature of the description of child support income as available income despite the numerous cases holding child support income of non-needy children to be generally unavailable for the purpose of AFDC eligibility assessment of their needy siblings. It is a well established principle of statutory con-

to note that while § 602(a)(38) specifically refers to the consideration of "Title II" benefits of non-needy siblings ("benefits provided under subchapter II of this chapter"), Congress chose not to include any reference to child support.[24]

As is more fully argued in the brief for appellees, Congress had no intention to

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struction that the conference report recommended to both Houses (which in this case had dropped any reference to child support income) carries far greater weight than any other legislative history. American Jewish Congress v. Kreps, 574 F.2d 624 (D.C. Cir. 1978).

[24] Amici curiae take no position as to whether Congress has successfully overruled prior federal law restricting the use of Title II benefits to the child on whose behalf it is paid, and note that the Supreme Court has not yet reached this question, although lower courts have. See Bowen v. Lesko, 639 F. Supp. 1152 (E.D. Wis. 1986) (order granting preliminary injunction), appeal docketed, No. 86-744, 55 U.S.L.W. 3372 (U.S. Nov. 5, 1986); Cunningham v. Toan, 728 F.2d 1101 (8th Cir. 1984), vacated, 469 U.S. 1154 (1985) (remanded for further consideration in light of DEFRA), modified on remand, 762 F.2d 63 (8th Cir. 1985).

preempt state law governing the restriction of the use of child support income.[25] To the contrary, the 98th Congress recognized that child support income is a special type of income essential to the child's well-being.[26]

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[25] North Carolina law reserving child support to the use and benefit of the child in whose name the order issues has not been preempted by § 602(a)(38). While Congress is free to require states that participate in the AFDC program to comply with federal rules that are in conflict with state law, Townsend v. Swank, 404 U.S. 282 (1971), it can only do so where AFDC applicants and recipients are concerned. For supported children who do not wish to apply for or receive AFDC benefits, the general preemption rule applies: in the domestic relations arena, state law prevails over federal law unless there has been a direct federal enactment to the contrary to prevent major damage to federal interests. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1972). There has been no such direct enactment, nor showing of damage. See brief for appellees at Section I.

[26] See Section I(D), infra, for a discussion of Congressional recognition of the importance of child support income. Consider also, 42 U.S.C. § 602(a)(31) (Supp. III 1985), which, in states where stepparents are not legally responsible for

There is no support for appellants' extraordinary view that it is always to a child's benefit to use his or her child support, specifically ordered to meet his or her reasonable needs, to replace the AFDC funds of his or her needy siblings. In the absence of any language in § 602(a)(38) justifying their position, appellants' regulations attempt to give minor children the responsibility to support their own adoptive and half-siblings with funds earmarked by state

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stepchildren, provides that part of the stepparent's income may still be considered in assessment of the stepchildren's eligibility for AFDC, but only after application of certain "income disregards." One of these disregards removes from consideration "payments by such stepparent of...child support with respect to individuals not living in such household." 42 U.S.C. § 602(a)(31)(D). The child support income ordered by a court to be paid by the stepparent to his or her own absent children is recognized as an important obligation to children for whom the stepparent has legal responsibility, which should be honored.

courts for use in the best interests of the supported child alone. By treating child support income of the siblings of needy children as income which is always available to those needy children, appellants' regulations violate state law without preempting it. This Court should declare these regulations invalid.

(B) Appellants Have Erred In Requiring Children Who Do Not Want Or Need AFDC To Apply For AFDC

The standard filing unit regulations promulgated by appellants, purportedly to implement § 602(a)(38), in fact misconstrue that statute in a fashion that goes far beyond merely considering child support income as "available" for expenditure on needy siblings. Instead of simply requiring caretaker relatives applying on behalf of their needy children to file evidence of the numbers and legally unrestricted income

of other minor siblings in the household, as § 602(a)(38) dictates, the standard filing unit regulations require that all such minor siblings must become applicants for AFDC as a condition for eligibility for AFDC of the needy children. No longer may the caretaker relative decide whether it would be in the best interests of a particular independently supported child to apply for AFDC. Examination of the language of § 602(a)(38) reveals that this requirement has no statutory justification.

Had Congress intended that all independently supported children should, without exception, be required to apply for AFDC and be treated as dependent children if they live with others who seek AFDC, it would not have carefully chosen the language of § 602(a)(38) in order to avoid the presumption that such children are necessarily dependent children. Section

602(a)(38) not only distinguishes the needy dependent child from the non-needy siblings to which it refers (using the phrase "with respect to the dependent child"), it also defines the siblings of the needy dependent child as children who meet the conditions described in §§ 606(a)(1) and (2). To be a dependent child eligible for AFDC,[27] a child must not only meet the conditions described in § 606(a)(1) and (2), but must also be needy.[28]

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[27] AFDC is defined by 42 U.S.C. § 606(b) (Supp. III 1985) as "money payments with respect to a dependent child or dependent children."

[28] § 606 provides, in pertinent part:

> The term "dependent child" means a needy child (1) who has been deprived of parental support or care ..., and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student ....

42 U.S.C. § 606(a).

Amici curiae recognize, as did Congress, that some independently supported children of AFDC recipient siblings may need and want AFDC, food stamps or medicaid. Such children, as appellants acknowledge, have always been free to apply for aid. The independently supported children who are plaintiffs in this case, on the other hand, do not want or need AFDC and do not want to be treated as dependent children. Congress intended to avoid such involuntary treatment in enacting § 602(a)(38).

Appellants, however, misread § 602(a)(38) to arrive at the erroneous conclusion that all children living with the same parent are dependent children who must actually apply for AFDC for themselves if any one of them wishes to do so. Had Congress intended this conclusion to be drawn, it could easily have amended §

606(a) itself to include all minor siblings of dependent children living in the same household within the definition of dependent child. It did not do so.

(C) Appellants Have Erred In Requiring Children Who Do Not Want Or Need AFDC To Assign Their Child Support Income To The State

The consequence of requiring all independently supported children to apply for AFDC if needy siblings with whom they live do so, is that supported children are losing the full benefit of their child support income.[29] This happens because recipients of AFDC are required to assign to the North Carolina Department of Human Resources their rights to collect their

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29 See, supra, note 10 and accompanying text.

child support, pursuant to 42 U.S.C. § 602(a)(26)(A) (Supp. III 1985).[30]

If, as argued above, non-dependent children were not forced to apply for or receive AFDC, § 602(a)(26)(A) would not apply to them. Indeed, a clear indication that § 602(a)(38) does not require non-dependent children to apply for AFDC is that if it did, § 602(a)(26) would by its literal terms require an assignment of the children's support rights to the North Carolina Department of Human Resources. Yet, the legislative history of

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[30] Section 602(a)(26) provides, in pertinent part:

> as a condition of eligibility for aid, each applicant or recipient will be required - (A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed...

42 U.S.C. § 602(a)(26).

§ 602(a)(26) establishes that the section was never intended to be used to reduce children's income or to reimburse the state for AFDC payments to children for whom the supported child has no financial responsibility.

Section 602(a)(26) predates § 602(a)(38) by ten years. The former section was added to the Social Security Act by the 93rd Congress, which also established the "IV-D" child support enforcement program. 42 U.S.C. §§ 651-667 (1982 & Supp. III 1985). Congress acted after being informed by the Senate Finance Committee that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents."[31] The

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31 S. Rep. No. 1356, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News, 8133, 8145.

amended Act provided that child support income was no longer to be treated as income in calculating AFDC payments.[32] Instead, the Social Security Act requires AFDC recipients to assign support rights to the state[33] and then ignores child support income when calculating AFDC payments. The states are allowed to collect the support and to retain support payments collected

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[32] See discussion of 1975 Amendments in Quarles v. St. Clair, 711 F.2d 691, 694-5 (5th Cir. 1983). See also 10 N.C.A.C. 49 B.0308 (once child support income is assigned to state, it stops being countable income for purposes of determining the amount of the AFDC check).

[33] The caretaker relative of a child, as applicant for AFDC on the child's behalf, has the legal ability to make the child support available to the state, where to do so is in the child's best interests. Where the child is deprived of the full benefit of the child support income, it is not in the child's best interests to assign. The assignments required by the standard filing unit regulations violate the terms of court-ordered support payments and thus violate state law, which, as stated in Section I(A), was not preempted by § 602(a)(38).

"as reimbursement for any past assistance payments made to the family for which the State has not been reimbursed." 42 U.S.C. § 657(b).

Congress had no intention, however, that any child should be left financially worse off because of child support assignment. With needy children in mind, it provided that if the child support collected exceeds amounts payable in AFDC benefits (for example, if sizeable arrears are paid in a lump sum), then once the state and federal agencies have been reimbursed for past AFDC payments, any remaining support is passed back to the family and the family is removed from the welfare rolls.[34]

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[34] See Dept. of Human Resources v. Bagley, 142 Ga. App. 353, 235 S.E.2d 734, aff'd, 240 Ga. 306, 240 S.E.2d 867 (1977).

> [T]he assignment of an accrued right of support [pursuant to § 602(a)(26)] to the state is for the purpose of allowing the state to initiate collection litigation. It is cer-

42 U.S.C. § 657(b)(4). While this system has always worked satisfactorily in families where no child received more in child support than he or she was entitled to receive in AFDC, it cannot function as intended by Congress if children with greater amounts in child support are forced to join the system. Unless such children have enough child support or enough in arrears to reimburse the state for the whole family's grant, they will never receive more than their proportional share of the AFDC grant and the monthly child support disregard of $50. The child support taken from these children reimburses the state not only for payments on

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> tainly not for the purpose of taking away those very payments which would render the family unit financially solvent and by so doing to leave it in a situation where the governmental agency continues with the burden of making monthly welfare payments.

142 Ga. App. at 355, 235 S.E.2d at 736.

their behalf and on behalf of their caretaker relative, but also for payments made to their needy siblings. Congress never intended in 1974 that the state should divert child support money paid to one child in order to reimburse itself for AFDC payments to other children.[35]

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[35] Congress' intent not to deprive children of the full benefit of their child support income in enacting § 602(a)(26) is also evident in the enactment at the same time of § 602(a)(28) (Supp. III 1985), another section designed to protect needy children giving up child support rights. Not all states provide an AFDC payment which exactly matches the amount by which a family unit's countable net income falls below the state-set payment standard; in some states, the payment is actually less. Section § 602(a)(28) provides that in such states, the state should return to children that portion of their child support that, with the AFDC payment, will bring them up to the point of ineligibility for AFDC. Even if a child's child support income is smaller than the amount of AFDC actually paid out § 602(a)(28) applies, to ensure that becoming an AFDC recipient and assigning away child support rights does not reduce any child's income.

In the legislative history of DEFRA there is no mention of any intent to expand the coverage of § 602(a)(26) to include the support income of non-dependent children. Had Congress intended to use that section, as never before, to deprive non-dependent children of their right to the benefit of all their support income, it would surely have so indicated.

(D) It Was Not The Intent of The 98th Congress to Deprive Any Children of Their Right to Full Benefit From Their Child Support Income Or To Put Unwilling Children On Welfare

Courts nationwide are now faced with lawsuits challenging the legality of the state and federal regulations interpreting § 602(a)(38).[36] That the interpretation of § 602(a)(38) presented above is the correct one is confirmed by analyzing § 602(a)(38)

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[36] See Jurisdictional Statement of Appellants Kirk et al., at 12, n.1 (citing cases).

in the context of the entire Social Security Act, 42 U.S.C. § 301 et seq. (1982 and Supp. III 1985) as amended by the 98th Congress. See Richards v. United States, 369 U.S. 1, 11 (1962) (section of a statute should not be read in isolation from the context of the whole Act).

The Social Security Act is a comprehensive anti-poverty statute, designed, inter alia, to cope with the connected problems of unpaid and inadequate child support, child poverty, and need for AFDC.[37]

The AFDC program was originally devised in 1935 to provide support to "children and families which have been

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37 See generally, H.R. Select Comm. on Children, Youth and Families, 98th Cong., 1st Sess., Federal Programs Affecting Children (Comm. Print 1950) (reference work compiling information on, inter alia, Social Security Act anti-child poverty programs).

deprived of a father's support ... principally families with female heads who are widowed, divorced or abandoned." S. Rep. No. 74-628, 74th Cong., 1st Sess., 17 (1935). Amendments to the Social Security Act in 1975 created the Child Support and Establishment of Paternity Program, 42 U.S.C. §§ 651-667, which reflected the Senate Committee on Finance's statement of principle that "all children have a right to receive support from their fathers."[38] As the Senate Report stated: "[t]he immediate result [of linking the child support enforcement system to the AFDC program] will be a lower welfare cost to the taxpayer but, more importantly, an effective support collection system."[39]

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[38] S. Rep. No 1356, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News, 8133, 8146.

[39] Id. (emphasis added).

Child support has thus long been seen as vital in removing children from the AFDC rolls and from the most abject poverty.

Appellants' interpretation of the intent of Congress in enacting § 602(a)(38) is fundamentally at odds with Congress's recognition of the importance of child support enforcement as the key to removing children from the welfare rolls. Appellants appear to believe that in 1984, the 98th Congress decided to reverse its position that needy children on AFDC should be aided by government to secure adequate child support from absent parents and thus to move from the ranks of the most deprived. The 98th Congress is said by appellants to have decided to confiscate the child support income of non-needy children, requiring those children to receive a smaller sum in return, in the form of an AFDC grant and $50 disregard,

solely because these children live with needy siblings who must apply for AFDC in order to survive economically. The net result of this interpretation is a larger number of recipient children on AFDC, an increase in the number of needy children, and increased strain on child support enforcement agencies nationwide.[40] Nothing could be further from the actual intent of

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[40] In the district court below, District Judge McMillan, based on affidavits submitted by plaintiffs, found that the state and federal regulations, which deprive children of the full benefit of their support income, have

> already discouraged some absent fathers from continuing to honor their support obligations ... These negative paternal reactions present a risk of non-collection ignored by the defendants. The cost of pursuing deliberately delinquent fathers will not be insignificant. Also those fathers who voluntarily provide regular support payments but whose paternity has not been legally established will prove particularly difficult and costly targets for collection.

633 F. Supp. 1529, 1552-3.

the 98th Congress regarding the Social Security Act.

The 98th Congress, far from reversing or diluting the position that children have a right to child support, strengthened the nation's child support enforcement programs for the benefit of all children. In the same session as the 98th Congress added § 602(a)(38) to the Social Security Act, it also unanimously revised Section IV-D of the Social Security Act to affirm the principle that government funded child support enforcement should be available not only to AFDC recipients, but also to all other children who do not want or need AFDC.[41] In doing so, Congress focused on

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41 The Child Support Enforcement Amendments (CSEA) of 1984 thus amend § 651 of the Social Security Act to reflect the newly stated intent of the Act of "assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for aid under Part A [AFDC]) for whom such assist-

the need to help poor children and their mothers, who are usually the custodial parents, to attain independence from federal welfare programs. This focus can be seen in the comments of the Senate sponsors of the Amendments. See, e.g., Statement of Senator Dole:

> It is important to remember that the Federal-State child support enforcement program is designed not to produce revenue for the States and local jurisdictions -- or for the Federal Government. The goal of this program is to collect child support for children at a reasonable cost.... We must all -- Federal, State and local governments -- work harder to insure that all American children receive the financial support to which they are entitled.

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ance is requested." Pub. L. 98-378 § 2, 98 Stat. 1305, 1330, 98th Cong., 2d Sess. (1984) (emphasis added).

It should be noted that the CSEA are particularly instructive in the interpretation of DEFRA amendments, as they are a statute in pari materia, dealing with the same subjects, AFDC and child support, and enacted by the same legislative body at the same time. See Erlenbaugh v. United States, 409 U.S. 239, 244 (1972).

130 Cong. Rec. S4803 (daily ed. April 25, 1984);

Statement of Senator Domenici:

> [D]irect Federal support is only a financial band-aid. The real solution is adequate parental support for [the] children.

130 Cong. Rec. S4807 (daily ed. April 25, 1984);

Statement of Senator Abdnor:

> [T]he vast majority of these custodial parents are women, many of them are struggling to make ends meet . . . . This measure will serve to assist these single parent families while each year saving taxpayers approximately $120 million in welfare payments.

130 Cong. Rec. S4807 (daily ed. April 25, 1984).

The Senate Finance Committee also reiterated in 1984 the principle that "all hildren have the right to receive support from their fathers."[42] This principle is meaningless if read instead to give all

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42 S. Rep. No. 387, 98th Cong., 2d Sess., 6, reprinted in 1984 U.S. Code Cong. & Ad. News 2397, 2402.

states the right to receive the child support paid by absent parents of non-needy children and pass on only a portion of it, if such children happen to live with needy siblings whose economic survival depends on receipt of AFDC assistance.[43] Congressional intent in 1984 could therefore not have been to place non-needy children on AFDC, thereby depriving them of part of their child support income and reducing them to the level of need and welfare recipient status of their needy siblings.

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43 The CSEA have been credited by federal appellant Bowen for "substantial progress in collecting the support which absent parents owe to their children," and for making efforts "even more effective in finding absent parents and collecting the support which is due to their children". Dr. Otis R. Bowen, quoted in "Program May Gain $3.2 Billion for Child Support," N.Y. Times, Dec. 23, 1986 at B5, Col. 3 (emphasis added). Children required by the standard filing unit regulations to live at the economic level of AFDC recipients are not benefitting from this welcome increase in success in child support enforcement.

The 98th Congress took the problem of child poverty very seriously, as an examination of the grim statistics documenting this problem requires.

In 1982 13.5 million children lived in poverty, more than one in five of all children, and seven million of them lived in female-headed single parent households.[44] The poverty of black and Hispanic female-headed families is particularly acute; 66% of black female-headed families with children were poor in 1983.[45] Of the 8.7 million women living with children

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44 Subcomm. on Oversight and Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 98th Cong. 1st Sess., Background Material on Poverty, at 14-16 (Comm. Print 1983).

45 Children in Poverty: Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 99th Cong., 1st Sess. (1985) (statement of Harold Ford, Chairman of Subcomm.).

under 21 years of age whose fathers were not living in the households in 1984, only 5 million were awarded child support, and of the 4 million of them due to receive child support in 1983 only 50 percent received the full payment due.[46] About 26 percent of the 4 million received only partial payment and 24 percent received none of the support due.[47]

Even if Congress intended to recognize that certain income of siblings living with needy children is available to meet the household's common needs, a Congress which contended that all children have a right to receive support from their absent parents,

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46 Bureau of the Census, U.S. Dep't of Commerce, Child Support and Alimony: 1983, Current Population Reports, Series P-23, No. 141, at 11 (1985). In 1984 black and Hispanic women were far less likely than white women to be awarded child support payments. Id. at 2.

47 Id.

could not logically have countenanced depriving a subset of children (those who live with desperately needy siblings) of that right. The 98th Congress did not intend to turn the AFDC safety net into a dangerous poverty trap for children who, fairly remarkably given the statistics above, receive sufficient support from their absent parents so that their custodial parents conclude that it would not benefit them to apply for AFDC.

In sum, even though deference is often accorded the interpretation given a statute by the agency charged with administering it, that deference should never rise to the level of blind faith; a court is obliged to accept the administrative construction of a statute only so far as it is consistent with the intent of Congress in adopting the statute. Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 473 (9th

Cir.), cert. denied, 464 U.S. 892 (1983). This Court should not defer to the administrative construction of § 602(a)(38) by the appellants when there are "compelling indications that it is wrong." Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 94-95 (1973), quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). The language, legislative history and purpose of the Social Security Act furnish exactly such compelling indications that appellants are wrong and that their regulations are invalid.

II. § 602(a)(38) VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION BY INVIDIOUSLY DISCRIMINATING AGAINST INDEPENDENTLY SUPPORTED CHILDREN WHO LIVE WITH NEEDY SIBLINGS

As discussed in Section I, supra, this Court should rule that the standard filing unit regulations violate Congressional

intent and thus avoid unnecessary constitutional adjudication. See United States v. Security Industrial Bank, 459 U.S. 70 (1982); Califano v. Yamaseki, 442 U.S. 682, 692-93 (1979); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501 (1979). However, should this Court decide that Congress intended to reduce independently supported children to the economic level and status of their needy siblings on welfare, § 602(a)(38) must be struck down as constitutionally infirm. This Court should affirm the district court ruling that

> the failure of the state to enforce its own laws restricting the use of [the non-needy child's] income, and the state's taking of the money from his or her mother under duress represent a deprivation of property in violation of the ... Equal Protection Clause ... of the Fourteenth Amendment.

633 F. Supp. at 1555.[48]

Section 602(a)(38) sets up a classification of a subset of children who have a legal right to receive child support from an absent parent. This classification of children, otherwise similarly situated, is made solely on the basis of their adoptive or blood relationships to needy siblings with whom they live.[49] These relationships

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48 This Court has long applied the same equal protection standards to the federal government under the fifth amendment's due process clause as it has to state governments under the fourteenth amendment. Weinberger v. Salfi, 422 U.S. 749, 770 (1975).

49 Toward the end of his brief, at the end of a footnote, the federal appellant contends that "child support recipients who live with needy families are not situated similarly to child support recipients who live in other circumstances." (Brief for federal appellant at 45, n.18). This brief assertion, offered with a citation to three cases but no further elaboration, begs the question. Insofar as the rights of children to receive the full benefit of their child support are concerned, all children of living absent parents are similarly

and living arrangements are beyond the control of the supported children singled out by government for the purpose of this classification. The classification deprives these children of equal protection of child support enforcement laws, and renders the state courts' careful calculations of the children's reasonable needs for child support a travesty.

The district court was correct in applying a heightened scrutiny standard of review to this classification, because it penalizes children on the basis of their family living arrangements.[50] Where the

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situated. See Affidavit of Judge Patricia Hunt, J.A. at 156-161.

[50] The term "heightened scrutiny" is used to signify any standard above the rational basis standard, which requires only that the law have a legitimate purpose and a rational relationship in the fulfillment of that purpose. McGinnis v. Royster, 410 U.S. 263 (1973). For a law to survive heightened scrutiny, it must at least bear a substantial relationship to an important

"government intrudes on choices concerning family living arrangements" in a direct manner, such a level of scrutiny is appropriate. Moore v. City of East Cleveland, 431 U.S. at 499. In the instant case heightened scrutiny must be applied in assessing a classification which clearly intrudes on choices concerning family living arrangements. As the district court found, the classification can force AFDC custodial parents to break up a household by sending supported children away in order to save them from loss of the full benefit

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governmental objective, and be narrowly tailored to serve a compelling state interest. See Craig v. Boren, 429 U.S. 190 (1976); Moore v. City of East Cleveland, 431 U.S. 494 (1977). The three different standards--rational basis, intermediate scrutiny, and strict scrutiny--are simply different approaches to determining whether a classification denies individuals equal protection of the laws. To avoid such a denial, a classification must ensure that "all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

of their child support when their needy siblings file for AFDC. 633 F. Supp. at 1558. See also Affidavit of Mary Medlin, J.A. at 57-59.

The district court was also correct to draw an analogy between this case and Gomez v. Perez, 409 U.S. 535 (1973), another case involving infringement on vital rights to child support from absent parents, in which this Court applied a heightened scrutiny standard of review to strike down a statute denying child support to illegitimate children. This Court held in Gomez that "once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." 409 U.S. at 538. The same analysis and standard of

scrutiny apply to the infringement on a child's essential and judicially enforceable right to needed support solely because the child's custodial parent has other unsupported children living in the same household. The right to receive full benefit from support from an absent parent, as recognized in Gomez, is exactly the right at issue in this case. The illogic, injustice and unconstitutionality of denial are identical in both Gomez and this case.

The District Court also correctly justified application of a heightened scrutiny standard of review by relying on decisions protecting children from discrimination solely based on family circumstances beyond their control. This Court, in Plyler v. Doe, 457 U.S. 202 (1982), recognized that a statute denying free public education to the children of

undocumented aliens was unconstitutional in discriminating against "a discrete class of children not accountable for their disabling status." 457 U.S. at 223. In Plyler, this Court applied a heightened scrutiny standard of review because the denial of education can cause lasting psychological and economic damage to a child. 457 U.S. at 221-223. The deprivation of support from an absent parent can similarly cause a child psychological and economic damage. See Affidavit of Carol Stack, J.A. at 139-156.

While neither education nor child support are rights guaranteed by the Constitution, they are both rights of vital importance to children. It is significant that the Senate Finance Committee emphasized in 1974 and 1984 that "[t]he Committee believes that all children have the right to receive support from their

fathers."[51] In Plyler, this Court concluded that a governmental concern for reducing public expenditures cannot, by itself, justify such an otherwise invidious classification which imposes lasting penalties on innocent children. 457 U.S. at 227, 229. The district court's conclusion to the same effect in this case should be upheld. 633 F. Supp. at 1557.

The governmental purposes put forth by appellants to justify the classification survive neither a heightened scrutiny standard of review nor the less stringent "rational relationship" standard of scrutiny. Thus, even if this Court does not apply a heightened standard of review, the challenged practices fail to pass Constitutional muster.

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51 See supra, pp. 40, 45 (emphasis added).

Federal appellant suggests that the Congressional purpose in enacting § 602(a)(38) was to allocate scarce AFDC payments only to those children it regarded as most needy. (Brief for federal appellant at 41). Section 602(a)(38) has in fact led, as the facts of this case show, to the receipt of AFDC by numbers of children who do not want or need AFDC. 633 F. Supp. at 1543. Those children would not have been classified as "most needy" before 1984 even though they lived in households that already received AFDC.

If the governmental purpose was in fact to reduce the federal deficit by confiscating child support from non-needy children to reimburse state and federal governments for AFDC payments to other children, § 602(a)(38) fails the rational basis test because it is patently arbitrary. As the district court stated,

siblings have no legal duty to support each other, nor singlehandedly to reduce the deficit. 633 F. Supp. at 1554-1555. Further, placing more children on the welfare rolls simply to get governmental control of their child support income is hardly a rational way to save money. As documented above, absent parents may then refuse to pay that support, requiring state child support agencies to go to enforcement expense while also having to continue AFDC payments to the children.[52]

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52 See supra nn. 30 & 40. The argument of federal appellant that the $50 payment of child support passed on to AFDC recipients per month is sufficient incentive to non-custodial parents to continue paying child support is flawed. (Brief for federal appellant at 11). The child still loses that portion of his or her child support that exceeds his or her share of the AFDC grant and the family's $50 per month. While amici curiae in no way condone the failure of absent parents to honor their child support obligations, "[i]t does not require much reflection to understand that an estranged spouse who has money withheld from his paycheck but never

If the governmental purpose behind § 602(a)(38) is instead the paternalistic removal from the AFDC recipient of most of the burden of pursuing non-custodial parents who fail their support obligations (Brief for the federal appellant at 39), the section again fails the rational relationship test. Exactly the same strong child support enforcement measures are available to AFDC and non-AFDC families. It is irrational to pursue a governmental interest in having child support paid to the correct beneficiaries by having the state collect it, and then fail to return part of it to the child on whose behalf the state acted.

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delivered to his children will be less likely to participate in a withholding program." Wilcox v. Petit, No. 85-0342P (D.C. Me. Dec. 9, 1986) (referring to flaws in the $50 return program: even if two months' child support collected in one month, only $50 returned to family).

Appellants are incorrect in seeming to suggest that this Court rubber stamp § 602(a)(38) as constitutional simply because it is social welfare legislation, and because this Court found that Congress could rationally require all siblings to be treated as one household for food stamp allotment purposes in Lyng v. Castillo, 477 U.S. __, 106 S.Ct. 2727 (1986). (Brief for federal appellant at 40-47; brief for [state] appellants at 10-11). Appellees and amici curiae are not before this Court to argue, as many have done unsuccessfully in the cases cited by the federal appellant,[53] that there exists a fundamental right to welfare. This case involves the radically different rights to receive the full benefit of child support and not to be required to be on welfare. Lyng is distin-

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53 Brief for federal appellant, p. 43 n.16.

guishable in that it involved a determination that requiring all siblings to apply for food stamps as one household had a rational relationship to the legitimate governmental purpose of preventing multiple fraudulent applications from one household. 106 S.Ct. at 2729. Rationality is a concept dependent on a particular purpose. The rationality of a practice in one case is thus no precedent in another case involving a very different asserted purpose. Further, in Lyng, this Court did not address the question of whether legally restricted income can rationally be presumed to be available to needy siblings of supported children. Lyng is an inapposite case dealing with asserted rights to receive welfare, which are irrelevant to the right of a child not to receive welfare as a condition of a sibling's welfare eligibility.

Therefore, this Court should affirm the district court's ruling that § 602 (a)(38) is constitutionally infirm in violating the equal protection component of the fifth and fourteenth amendments to the Constitution.

CONCLUSION

For all of the above reasons, amici curiae respectfully request that this Court affirm the holding of the district court below.

Respectfully submitted,

Sally F. Goldfarb,
Counsel of Record
Alison Wetherfield
Sarah E. Burns
Marsha Levick
NOW Legal Defense and Education Fund
99 Hudson Street
New York, New York 10013
(212) 925-6635

INTEREST OF AMICI CURIAE

The NOW Legal Defense and Education fund (NOW LDEF) is a not-for-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women, a membership organization of over 170,000 women and men in more than 725 chapters throughout the country. Family law, and in particular the economic rights of women in the family sphere, are a major focus of NOW LDEF's work. The organization has filed amicus curiae briefs on family law issues in numerous cases in state and federal courts. Cases in which NOW LDEF has filed amicus curiae briefs before this Court include Hisquierdo v. Hisquierdo, 439 U.S. 572

(1979), and McCarty v. McCarty, 453 U.S. 210 (1981).

J. Joseph Curran, Jr., Attorney General of Maryland, joins this brief amici curiae because the position it takes is substantially consistent with the position taken by the State of Maryland in related litigation in which it is directly involved. Maryland Dep't. of Human Resources v. U.S. Dep't. of Health and Human Services, 648 F. Supp. 1017 (D.C. Md. 1986), appeal pending, No. 86-3076 (4th Cir.) In that case, the U.S. Court of Appeals for the Fourth Circuit has placed the appeal in abeyance pending disposition of the instant cases in the United States Supreme Court. The Attorney General's interest as amicus curiae is specifically related to his concern, placed before the United States District Court in the case cited above, that the federal policy in issue requires the State to disrupt and undermine its own orderly child

support scheme. State support orders, and the statutes on which they are based, contemplate that support awards are to be fixed in relationship to the ascertained needs of the child on whose behalf they are paid, not his or her siblings.

The Association for Children for Enforcement of Support, Inc. (ACES) is dedicated to assisting disadvantaged children affected by parents who fail to meet legal and moral child support obligations. ACES has chapters in thirty states and has a total membership of over ten thousand.

The Center for Constitutional Rights (CCR) is a non-profit litigation and educational organization. Founded in 1966 to provide legal support during the southern civil rights movement, CCR has been a national resource for civil rights and social justice. Securing economic justice, especially for poor

women and their children, is a priority for CCR.

The Center for Law and Social Policy is a public-interest law firm which works to improve the plight of America's low-income families with children. The Center's efforts focus on the development of a non-discriminatory employment system and a fair and equitable public benefits system complemented by a more effective system of child support enforcement. The Center serves custodial parents and children who, like the plaintiffs in Bowen v. Gilliard and Kirk v. Gilliard, are adversely affected by the sibling deeming provisions of Section 402(a)(38) of the Social Security Act. The Center also serves non-custodial parents whose efforts at supporting their children are undermined by Section 402(a)(38).

The Child Support Action Network (CSAN) is a parents' advocacy group for child support

enforcement. The primary goals of the organization are: (1) to educate and support those who must personally deal with the child support enforcement system; (2) to promote increased accountability at federal, state, and local levels in enforcement of court-ordered child support; and (3) to develop increased visibility and public awareness on the issue of non-support. The organization opposes the practices of requiring non-needy children in a household to assign their child support income to the state, a practice which is challenged in the present case.

Connecticut Women's Educational and Legal Fund (CWEALF) is a non-profit public interest law firm that combines legal strategies with community education and training to advocate for women's rights. CWEALF also provides a telephone information and referral service to respond to questions about sex discrimination and other legal issues of concern to women.

Almost three-quarters of the callers to the information and referral service have family law concerns, including child support.

Custodial Advocates Seeking Enforcement of Child Support is a self-help organization founded in January 1986. The goals of the 200-member organization are (1) to ensure the enforcement of the laws pertaining to child support; (2) to assist others in learning about these laws; and (3) to provide information and resources.

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based nonprofit legal and educational corporation dedicated to enforcing and promoting equal rights under the law for women. ERA has a long history of activism in the courts and community on issues that affect women's ability to support themselves and their families. This work includes filing amicus briefs before this Court on issues affecting women's economic status, advocating

for a fair minimum wage, and educating women about their legal rights.

The National Association of Social Workers (NASW), a non-profit professional association with over 100,000 members, is the largest association of social workers in the United States. It is devoted to promoting the quality and effectiveness of social work practice and to alleviating or preventing sources of deprivation, distress and strain which impact recipients of social work services. NASW believes that the practice of "sibling deeming" further weakens many families receiving AFDC, penalizing them financially, discriminates against independently supported children who live with needy siblings and creates potentially damaging intra-familial strains in families which are already vulnerable.

The National Conference of Black Lawyers (NCBL) is an association of lawyers, scholars,

judges, legal workers, law students and legal activists. The purpose of NCBL is to enhance professional strength and skill for the benefit of the Black community in its struggle for full economic, social and political rights. NCBL has chapters throughout the United States and in Canada and the Caribbean.

The National Council of Jewish Women (NCJW) was founded in 1893. It is an organization made up of over 200 sections across the country which are active in advocacy and community services. NCJW is the oldest major Jewish women's organization in the United States, and its members are volunteers dedicated in the spirit of Judaism to the advancement of human welfare and the democratic way of life.

Northwest Women's Law Center ("Law Center") is a non-profit, membership-supported organization based in Seattle, Washington, that seeks to advance the rights of women

through law. Founded in 1978, the Law Center conducts education and information and referral programs to advise women in the Pacific Northwest of their legal rights. It also sponsors litigation in all areas involving women's rights, including cases in the family law and public entitlement areas. One of the Law Center's current priorities is to work toward relieving the economic problems suffered by women and children as a result of divorce, especially in the area of child support.

Parents Against Non Support is a non-profit social welfare organization whose members include single parents, spouses, parents who pay their child support, grandparents, and taxpayers who are aware of the problem of non support. The organization has approximately 300 members in California. It works with elected state officials and the family support office to improve child support

enforcement legislation and public awareness of the child support issue.

Parents Organized for Support Enforcement, Inc. (POSE) is a Tennessee based child support advocacy organization. POSE is a member of the Parents Without Partners Child Support Network and the National Children's Advocacy Coalition. POSE was founded in April 1985.

Parents Without Partners (PWP) is a nonprofit membership organization of 180,000 single parents based in 1000 chapters located in all 50 states, Canada and Switzerland. It was founded in 1957 in New York City to further the welfare and interests of single parents and their children, and presently is headquartered in Silver Spring, Maryland. PWP educates its members through chapter activities and publications, and advocates on behalf of single parents through a variety of activities. PWP is concerned that children

entitled to child support receive all such support, and that their non-custodial parents paying child support are entitled to have that support used for their own children.

The People Organized for Support Enforcement (POSE) is a non-profit organization composed of men and women concerned with child support enforcement. There are approximately 250 members in the Chattanooga, Tennessee area. POSE is committed to the right of children to be supported by both parents, and is deeply concerned about the plight of children being thrust into poverty at alarming rates throughout the nation.

Single Parents United 'N' Kids (SPUNK) is a non-profit organization comprised of men and women concerned with child support enforcement. The purpose of SPUNK is to inform and educate custodial parents about their rights, including existing and proposed legislation on the federal and state levels, and to bring

knowledge of the problem to the public's attention, while attempting to reinforce existing child support laws. The organization has over 300 members, including at least one mother who is an AFDC recipient and is directly affected by the practices challenged in Bowen v. Gilliard.

The Sisterhood of Black Single Mothers is a national self-help organization founded in 1973. The goal of the organization is to address the concerns of single mothers and thereby enhance the Black community at large.

Women Employed is a national organization based in Chicago with a membership of 3000. For the past 14 years, the organization has assisted thousands of women with problems of sex discrimination and achieving economic equity. Women Employed is currently working on analyzing state and national welfare policies and proposing reform measures.

The Women's Equal Rights Legal Defense and Education Fund (WERLDEF), Gloria Allred, President, is a California non-profit corporation dedicated to educating women about their legal rights and helping them to vindicate those rights by providing access to the courts. WERLDEF has a longstanding interest and involvement in child support issues, has sponsored many seminars and workshops on child support, and has been involved in planning and implementing innovative child support programs in the state of California.

The Women's Equity Action League (WEAL) is a national, non-profit membership organization specializing in economic issues affecting women, and sponsors research, educational projects, litigation and legislative advocacy. WEAL is committed to the full and effective enforcement of public benefits laws at both federal and state levels to assure that all

economic opportunities are available to women as well as men.

The Women's Law Project is a non-profit feminist law firm dedicated to improving the status and opportunities of women through litigation and public education. The majority of women assisted by the Women's Law Project are poor, and the Women's Law Project is concerned about the effect of "sibling deeming" in further undermining the economic status of low income women and their children. Moreover, the Women's Law Project believes that the sibling deeming rules at issue here will seriously erode child support enforcement efforts, with the result that yet more women and their children will be reduced to poverty.

The Women's Legal Defense Fund (WLDF), a nonprofit membership organization based in Washington, D.C. was founded in 1971 to assist women in their efforts to gain equality under the law. In response to numerous requests for

assistance on matters relating to child support, WLDF has instituted the Project to Implement Strategies to Equalize Child Support Responsibilities. Through this and other programs, WLDF provides technical assistance to attorneys, engages in nationwide fact gathering, analyzes current and proposed legislation and provides representation at the appellate level. In addition, WLDF worked closely with Congressional staff on the passage of the Child Support Amendments of 1984, and submitted comments on the implementing regulations proposed by the Department of Health and Human Services. In September, 1986, WLDF sponsored a three-day conference on child support guideline development as part of WLDF's ongoing involvement in guideline development throughout the nation.

(8) (10)

Nos. 86-509 and 86-564

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

—v.—

BEATY MAE GILLIARD, ET AL.,

Appellee.

PHILLIP J. KIRK, SECRETARY, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Appellant,

—v.—

BEATY MAE GILLIARD, ET AL.,

Appellee.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE FOOD RESEARCH ACTION CENTER, AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION IN SUPPORT OF THE APPELLEES

JOAN E. BERTIN
Counsel of Record
JOHN A. POWELL
LUCY BILLINGS
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

QUESTION PRESENTED

May the government, consistent with the constitutional protections accorded family matters, require that children receiving child support assign to the state their right to that support as a condition to the receipt of public assistance by half-siblings not receiving child support payments?

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide non-partisan organization of over 250,000 members. The ACLU has a long-standing interest in the rights of individuals and families to privacy and autonomy from unwarranted governmental intrusion and in the maintenance of chosen familial, associational, and living arrangements. The ACLU maintains active Children's Rights and Women's Rights Projects and has appeared before this Court on numerous occasions, both as amicus and as representatives of parties before the Court in cases implicating values of privacy, family, individual autonomy, and the rights of children.

The Food Research and Action Center engages in litigation, policy analysis,

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1/ Letters of consent to the filing of this brief from attorneys to the parties have been filed with the Clerk of the Court.

public education, and research on nutrition and food issues affecting low-income persons. The National Legal Aid and Defender Association is a private, non-profit membership organization that represents over 2,300 civil legal aid and public defenders' offices nationwide. Those civil programs in 1985 represented 1.5 million clients, many of whom would be affected by the outcome of this case.

SUMMARY OF ARGUMENT

This Court has declared that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). At issue in this case is a statute that tears at familial bonds and directly and substantially burdens family decisions. Such an intrusion upon fundamental rights so rooted in this Nation's heritage requires heightened scrutiny by this Court.

The statute at issue in this case requires that in order for a family to obtain AFDC benefits for the children of the household, any half-siblings in the house receiving independent child support from their absent parent -- support intended for and utilized by those children alone -- must

be surrendered to the state. In short, the statute requires that the state "attach" independent child support payments to one non-custodial parent's children if another's are to receive any support. These children, who prior to this statute's enactment would have received private support payments from their own, non-custodial parent, instead must join their half-siblings as public assistance recipients if their half-siblings are to be eligible themselves.

This requirement burdens the core of the fundamental interest in family life: the relationships and interactions between family members. Non-custodial parents are stripped of their ability to support their own children, and must instead watch their children join the public assistance rolls while their still-required support payments go instead to the state's coffers. Young children are put to a choice between a

continued support relationship with their natural parents or the availability of subsistence for their half-siblings. The custodial parent is required to choose between retaining one child's minimal support from the non-custodial parent, or obtaining another child's means of subsistence from AFDC. In sum, the statute acts to divide the house against itself, a situation that cannot withstand constitutional scrutiny.

Appellants argue that so extreme a burdening of fundamental rights need be subjected only to minimum rationality review because this case concerns welfare benefits. This Court's decisions in countless areas make clear, however, that the substantial burdening of a fundamental right must be accorded heightened scrutiny. Where the burden is direct and substantial, as it is here, even in the context of social welfare legislation this Court has applied a higher standard of review.

Even under minimal scrutiny, however, the statute at issue here must fall. It is utterly irrational. It increases welfare dependency while lowering family income -- all in the name of allocating scarcer welfare resources. It discourages child support payments by absent parents, and interrupts only those support relationships that have been successful and on-going -- all in the name of encouraging child support and family security. And it takes away from children virtually all the support they receive from a parent in the name of recouping the incremental savings a family realizes by sharing overhead.

Such a statute is utterly irrational. On its face it clearly does not achieve its purported goals. This Court must not allow so irrational and unconstitutional an invasion of fundamental rights to stand.

ARGUMENT

THE STATUTE IMPERMISSIBLY INFRINGES UPON FUNDAMENTAL MATTERS OF FAMILY PRIVACY AND AUTONOMY ENTITLED TO CONSTITUTIONAL PROTECTION, REQUIRING HEIGHTENED SCRUTINY OF THE GOVERNMENTAL INTERESTS ADVANCED AND OF THE EXTENT TO WHICH THEY ARE ACTUALLY SERVED BY THE STATUTE

I. THE MATTERS OF FAMILY LIFE INVADED BY THIS STATUTE ARE CONSTITUTIONALLY PROTECTED FUNDAMENTAL RIGHTS

The statute at issue in this case, Section 402(a)(38) of the Social Security Act, 42 U.S.C. (Supp. III) §602(a)(38), grievously burdens many constitutional rights. Amici concurs in the discussion of these issues in the briefs filed by appellees and various amici in support of appellees. In this brief, however, amici address only the fundamental rights of family privacy and autonomy long recognized and guarded by this Court, upon which this statute unconstitutionally infringes.

After setting out the nature of the right protected under this Court's ruling,

amici demonstrate the ways in which the statute impermissibly interferes with private and personal family decisions and relationships. Such interference with fundamental rights must be reviewed by this Court under heightened scrutiny; amici argue, therefore, that cases cited by appellants employing only minimum rationality review are inapposite. Finally, amici demonstrate that under either standard of review the statute cannot be sustained, as it is irrational.

"This Court has long recognized that freedom of personal choices in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974). See also Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.");

Zablocki v. Redhail, 434 U.S. 374, 385 (1978) ("among the decisions that an individual may make without unjustified government interference" are "personal decisions relating to . . . family relationships . . . and child rearing and education") (quoting Carey v. Population Services Int'l, 431 U.S. 678, 684-85 (1977)); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (citing cases).

Of course, "the family is not beyond regulation." But "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." Moore, 431 U.S. at 499 (citation omitted).

The Court has struck down a number of laws that penalized free choice of family living arrangements, even though it has

upheld virtually identical restrictions that had no such impact. Particularly illustrative are Village of Belle Terre v. Borass, 416 U.S. 1 (1974), and Moore. Belle Terre upheld a suburban zoning ordinance preventing unrelated persons from living together in groups, such as "hippie communes."

Conversely, Moore struck down a virtually identical ordinance that prevented a grandmother from living with her two grandsons. In Moore a city ordinance allowed only certain types of relatives to live together in a single dwelling. Inez Moore, who lived with her son and two grandchildren who were cousins, was prosecuted because her family did not fit within any of the ordinance's defined "family units." 431 U.S. at 496-97. In striking down the ordinance as unconstitutional, the Court stressed the right of family members to live together,

concluding that "[w]hen a city undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate." Id. at 499. The Court in Moore distinguished the Belle Terre ordinance on the grounds that the latter exempted related persons from its impact. Id. at 498.

But in United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), a case involving a statute analogous to the Belle Terre ordinance, the Court struck down a Food Stamp Act provision denying benefits to households containing unrelated persons, including so-called "hippie communes." In the context of a program "established . . . in an effort to alleviate hunger and malnutrition among the more needy elements of our society," id. at 529, the Court found the restriction of the living choices of even unrelated persons insufficiently justified by by any governmental purpose. Id. at 534-38.

As recently as 1984 the Court reaffirmed its belief that familial rights are fundamental. In Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984), the Court stated that "[p]rotecting [familial] relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty."

Family matters are thus firmly fixed in this Court's firmament of fundamental rights. The statute at issue goes further, however, than those struck down in the prior cases.

Section 402(a)(38) requires that a parent and all siblings living together must be included in the filing unit when a family applies for AFDC benefits. This provision was enacted specifically to require that children receiving child support payments independently of other children in the

household become part of the family unit receiving AFDC support instead. A pre-existing provision, Section 602(a)(26)(A), required that any family opting to include in the filing unit a child entitled to support payments must assign to the state any accrued right to support. By making the inclusion of such children mandatory, Section 402(a)(38) also makes it mandatory for a family seeking AFDC assistance to sign over to the state the child support payments of any other siblings who would previously have chosen to stay off public assistance and retain retain their separate subsistence support from their own parent. Under the statute, however, if a child or parent now wishes to maintain this private and traditional means of family support, no other siblings in the household may receive any public assistance.

This statute, then, does not merely burden family interests as did the

unconstitutional laws in Moore or Moreno; rather, as demonstrated infra Point II, it cuts into the very bonds of the family itself and cynically plays off family member against family member. This statute strikes more deeply and directly into the family than others this Court has struck down. Heightened scrutiny of this statute is required.

The diverse intrusions into the personal decisions central to the familial relations of the parents and children subject to this statute when taken together cut a disturbingly broad swath through the "realm of family life which the state cannot enter without substantial justification." Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

II. THE STATUE DIRECTLY AND SUBSTANTIALLY INVADES FAMILY INTERESTS BY SPLITTING THE INTERESTS OF INDIVIDUAL FAMILY MEMBERS, PITTING SIBLING AGAINST SIBLING AGAINST PARENT AGAINST PARENT, IN A MANNER ABHORENT TO "OUR HISTORY AND TRADITIONS."

As this Court has recognized, "[t]he unique role in our society of the family, the institution by which 'we inculcate and pass down many of our most cherished values, moral and cultural,' requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." Bellotti v. Baird, 443 U.S. 622, 634 (1979) (citing Moore, 431 U.S. at 503-04). Because the familial relationships affected by the statute here do not all fall within the paradigmatic "traditional" family structure, it indeed requires particular "sensitivity and flexibility" to appreciate fully the subtle yet far-reaching intrusions into the "integrity of the family unit," Stanley v. Illinois, 405 U.S. 645, 651 (1972), wrought by this statute.

It is well established that the "interest . . . of a [parent] in the children . . . undeniably warrants deference and, absent a powerful countervailing interest, protection." Stanley v. Illinois, 405 U.S. at 651. And see Moore, 431 U.S. at 503 n.12; Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). "Suffice it to say that this is not the first time this court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes . . . 'the liberty . . . to direct the upbringing and education of children.'" Griswold, 381 U.S. at 502 (White, J., concurring) (quoting Pierce v. Society of Sisters, 268 U.S. 510, 524-25 (1925)). The parent's interest in providing for the child's upbringing and ensuring the child's health and material well-being continues concommitant with the obligation to do so, after the original family structure has dissolved.

Under the statute at issue here, however, "[t]he non-custodial parent is apt to be discouraged from continuing to play a supportive role when his or her money is being collected by the state and paid to other children." Baldwin v. Ledbetter, 647 F. Supp. 623, 639 (N.D. Ga. 1986). In effect, the statute requires the transfer of the parent's support payments away from the child for whom they were intended -- and to whom the parent has not just a legal obligation, but a right, to provide support -- and the redirection of that support to other, unrelated children. It usurps to the state a critical aspect of the relationship between a non-custodial parent and the child. In fact, rather perversely, the family relationships actually affected by the statute are only those in which the parent has conscientiously fulfilled parental obligations. See infra Point IV. No government ought to be allowed

to tell parents that they cannot support their own children except to the extent that the state decides to pass along as much of the support as it determines that the child "needs."

Conversely, as one court has reasoned, "[i]f the role of the parent is so fundamental as to deserve special protection, then certainly the child has the right to enjoy the nurturing and guidance afforded by a parent willing to discharge his or her obligations." Baldwin v. Ledbetter, 647 F. Supp. at 638. The statute at issue short-circuits this right to a supportive parent-child relationship.

The federal appellant argues that "family members who reside in the same household, family members who are bound together by close and lasting emotional ties, are likely to share their resources and responsibilities." Brief of Appellant United

States (hereinafter U.S. Br.) at 46. But children receiving support payments receive them from someone to whom they are also "bound together by close and lasting emotional ties": the parent. The child is thus torn between "close and lasting emotional ties" to siblings and filial loyalty to the compelling desire of the non-custodial parent to help support the child at a minimum level of need. As the court below observed, no child "should be faced with a choice between parental relationships and financial survival." Order of Aug. 25, 1986, Gilliard v. Kirk, Civ. No. 2660 (W.D.N.C.), reproduced in Appendix to Jurisdictional Statement at A-144, A-147.

The intra-family "conflicts of interest" that the statute creates do not stop there, but pit one child against that child's half-siblings. While self-sacrifice for family members is undoubtedly a virtue, a child has

no legal duty to act selflessly, and it is quite another thing still for the government to require parents to teach this virtue to their young by putting the children to a choice between their rights -- including the right to receive parental support, at a level usually judicially determined to meet their essential needs -- and those of their siblings.

This Court has been loath, in fact, to allow parents voluntarily to require their children to surrender legal protection of their welfare in the name of moral duty. See Prince v. Massachusetts, 321 U.S. at 170 ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."). The government can hardly man-

date, then, that parents subject a child to such a morality test.

King Solomon probed a mother's love for her child by threatening to slice the child in half. If he were living in our day, King Solomon would not have such an awesome threat at his disposal, so he might test the mother's love by instead threatening to slice the child's meager means of subsistence. The statute at issue in this case, however, introduces a twist that King Solomon, in his wisdom, did not: The custodial parent must agree to either the slicing of one child's independent right to what may be only minimal subsistence or the withholding of all sustenance whatsoever from the other children. 2/

2/ Family law principles require that child support payments be used solely to promote the interests of the child to whom they are directed. See Gilliard v. Kirk, 633 F. Supp. 1529, 1548-49 (W.D.N.C. 1986); Tyndall v. Tyndall, 270 N.C. 106, 153 S.E.2d 819 [footnote cont'd]

There is, of course, a third ugly alternative: breaking up the family unit. This Court has suggested that family life is not unconstitutionally burdened simply when higher benefits might be available to a family if its members were to live apart, in more than one household. See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970). Here, however, the family's benefits are not merely reduced to some degree if it chooses to remain together; rather, if the supported child

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(1967); Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962). Appellants would stretch the plain sense of this duty to mean that an obligation to spend money solely on behalf of a particular child can be met by spending money on behalf of others. The government attempts to obscure the novelty (to say the least) of this assertion by noting that a child cannot "constrain his mother to spend [his father's support payments] exclusively on items that he alone will be permitted to use." U.S. Br. at 33. Obviously, a mother may, consistent with her obligation to spend the money for the child's benefit and not that of herself or others, spend a child's support money on his share of inherently shared purchases. That does not mean that she may, consistent with her legal obligations or the interests of the child or the father, spend the support payments to pay anyone else's share of these shared expenditures.

is to retain the minimal parental support to which the child is legally entitled, the household must be separated for the other children even to be eligible for benefits. Cf. Lyng v. Castillo, 106 S. Ct. 2727, 2730 n.3 (1986) (distinguishing Moreno, 413 U.S. 528) ("Unlike the present statute, the 1971 definition completely disqualified all households in the [applicable] category. . . . We concluded that this definition did not further the interest in preventing fraud, or any other legitimate purpose of the . . . Program.").

Thus, the custodial parent is put to quite a different choice under this statute than under one where a family might simply reap a slight economic benefit in living as two households. Cf. Castillo, 106 S. Ct. at 2730. The parent must choose among fulfilling the support duty to one child; signing away that child's legal right in

order to allow the other children in the family to obtain subsistence support; or breaking up the family. This is a choice of child versus child, to which no civilized government ought to put any parent, and represents such a uniquely inhuman set of alternatives as to invoke this Court's declaration that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights as they have been understood in 'this Nation's history and tradition.' [Moore], 431 U.S. at 503." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977) (footnote omitted).

This statute, then, manages to implicate and intrude upon, seriatim, the complete matrix of relationships that make a family -- no matter how dispersed -- a family. It tells children to choose between basic neces-

sities for themselves or basic necessities for their siblings, and to choose between a supporting parent's intentions and desires and their siblings' needs. It forces a parent to choose between the needs of one child or those of another, and sets the father's interests and obligations at odds with the mother's.

Few governmental schemes, short of physical intervention, so deeply intrude into so many aspects of family relations and decisions and so divide a house against itself. "[U]nless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the . . . Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." Moore, 431 U.S. at 501.

III. THIS COURT HAS CONSISTENTLY APPLIED HEIGHTENED SCRUTINY WHEN SOCIAL WELFARE LEGISLATION DIRECTLY AND SUBSTANTIALLY BURDENS A FUNDAMENTAL RIGHT

A. Heightened Scrutiny Is Normally Applied When Fundamental Rights Are Burdened. Minimal Scrutiny Is Utilized Only When The Welfare Requirement Burdening Such Rights Is Minimal.

Appellants argue erroneously that this Court's opinions "point unerringly to the principle that the proper standard for judicial review of social legislation is MINIMAL SCRUTINY." Brief of Appellant State of North Carolina (hereinafter State Br.) at 10 (emphasis in original); see also U.S. Br. at 40-41, 43 & n.16. This Court has laid down no such blanket rule that eligibility qualifications for a social welfare program are always subject only to minimal scrutiny simply because what is in question is "merely" social legislation. "When [government] undertakes such intrusive

regulation of the family . . . the usual judicial deference to the legislature is inappropriate." Moore, 431 U.S. at 499.

As this Court has recently reaffirmed, for instance, eligibility lines may not be drawn for social welfare programs on the basis of religious affiliation or belief. See Hobbie v. Unemployment Apps. Comm'n, 55 U.S.L.W. 4208 (Feb. 25, 1987). The Court held that "such infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest," id. at 4209, and rejected in such instances a standard that the government need only "demonstrate[] that a challenged requirement for governmental benefits . . . is a reasonable means of promoting a legitimate public interest." Id. (quoting Bowen v. Roy, 476 U.S. ____, ____ (1986)).

Similarly, the Court recently restated in the context of the right to travel

interstate the principal that when a law "infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of the law." Attorney General of New York v. Soto-Lopez, 106 S. Ct. 2319, 2321 (1986) (op. of Brennan, J.) See also Shapiro v. Thompson, 394 U.S. 618 (1969).

In fact, any fundamental right -- including fundamental family rights -- calls for heightened scrutiny when substantially burdened by governmental action. The source of the fundamental right -- whether the first amendment, the privileges and immunities clauses, the due process clauses, or various provisions of the Bill of Rights -- does not dilute this conclusion. The majority of Justices who have addressed the issue have found that protection of family interests does not occupy a less preferred constitutional position. As Justice White has noted

on more than one occasion, "Surely the right invoked in this case, to be free of regulation of the intimacies of [familial] relationship[s], 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" Griswold v. Connecticut, 381 U.S. at 503 (White, J., concurring) (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (opinion of Frankfurter, J.)).

Heightened scrutiny is thus called for unless the intrusion into these interests is insubstantial or indirect. See Lyng v. Castillo, 106 S. Ct. at 2729 (quoting Zablocki v. Redhail, 434 U.S. at 386-87 (heightened scrutiny required when social legislation "directly and substantially" interferes with right of family association and privacy).

B. The Cases Applying Minimal Scrutiny Are Inapplicable Here.

The distinction between "direct and substantial" and "indirect or insubstantial" interference, which determines when only minimal scrutiny need be employed, is more subtle than simply the distinction between an outright prohibition in haec verba, on the one hand, and everything else, on the other. For instance, in Zablocki, the Court found a "direct and substantial" interference with the right of marriage in a statute that did not prohibit marriage outright, but conditioned state permission upon the meeting of certain conditions. Zablocki, 434 U.S. at 375. Moreover, as the Court recognized in Hobbie, conditioning receipt of government benefits upon "voluntary" relinquishment of the exercise of a fundamental right is impermissible because "[g]overnmental imposition of such a choice puts the same kind of

burden upon [the exercise of a right] as would a fine." 55 U.S.L.W. at 4209

The burden on fundamental rights is even more direct and more substantial here. Not only are families required to choose between subsistence and familial relationships, but, as discussed supra Point I, the government-imposed choice directly intrudes upon family decisions and rends family relationships. The cases cited by appellants in which the Court has subjected social welfare legislation to only minimal scrutiny, U.S. Br. at 43 n.16; State Br. at 10, may be readily distinguished from the situation here.

In Lyng v. Castillo, 106 S. Ct. 2727, the burden imposed may have been direct, but the Court found it insubstantial. Close relatives who chose to live together suffered a reduction in benefits as a direct result of that decision. Writing for the Court, Justice Stevens noted, however, that the statu-

tory classification at issue was unlikely to have a substantial effect upon that choice. First, the classification at issue did not "completely disqualify all households" failing to meet its qualifications, as did the statute invalidated in Moreno, 413 U.S. 528. Castillo, 106 S. Ct. at 2730 n.3. Second, "in the overwhelming majority of cases[, the burden] probably has no effect at all. It is exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the cost of separate housing would almost certainly exceed the incremental value of the additional stamps." Id. at 2730 (emphasis added).

Here, however, the statute is exceedingly likely to impinge upon the family's choices. Unlike the statute in Castillo, families who fail to execute a mandated act that cuts into many facets of familial inter-

actions lose all eligibility for AFDC benefits. A family might not choose to live apart "simply to increase their allotment"; families that do not agree to the assignment provision under the statute at issue here, however, are faced with the choice of living apart or receiving no benefits whatsoever.

Furthermore, Castillo implies that the insubstantiality of the burden can be ascertained by comparing the net economic benefit of living apart (higher benefits minus additional cost of separate housing) and that of living together (scale economy of living together minus decrease in benefits). Id. This suggestion comports with common sense, as the benefit decrease is designed explicitly to reflect the scale economy that can be achieved by living together.

Here, however, the family does not achieve a benefit even roughly equal to the diminution in their allotment. The "penalty"

for living together is not, as in Castillo, a rough recoupment of the savings that accrue to the family for doing so, but rather consists of the forfeiture by the children of their child support income, in an amount, obviously, utterly unrelated to -- and generally greatly exceeding -- the economies of living together.

In addition, the weight of this "penalty" for familial cohabitation does not fall on the entire family, as an offset to the scale economies realized by the family, as in Castillo. Rather, it falls only upon the child receiving the support payments. Thus, one might conclude in Castillo that familial living choices are little affected because the family in toto comes out roughly the same under either option; but here a particular family member -- a child, no less -- does come out far worse if that child remains with his or her siblings. This

greatly encourages either the separation of the children in the household or the disrupting of the relationship between non-custodial parent and child. The logic of Castillo thus is not applicable here.

Neither, on the other hand, is the logic of such social welfare cases as Weinberger v. Salfi, 422 U.S. 749 (1975). In Salfi, widows of former recipients of disability benefits were ineligible for continued benefits if they had been married to the deceased for less than nine months. The total denial of benefits is clearly a "substantial" burden, as discussed supra. See Castillo, 106 S. Ct. at 2730 n.3. The requirement imposed in Salfi was not, however, "direct." At the time that the couple were married, they could not have known that the marriage would last less than nine months; the qualification therefore could not have deterred their decision to enter into marriage. The provision

in question in Salfi therefore did not "directly" burden the right in question because it could not realistically effect the exercise of that right.

The case presently before the Court is clearly distinguishable. Here, the decision to live together as a family, as well as all the other familial concerns discussed supra Point II, are all directly burdened by the government disincentives: The imposition of the financial penalty depends directly upon the family decisions made by the mother and child, and its effects directly influence those decisions. 3/

3/ Thus Schweiker v. Wilson, 450 U.S. 221 (1981), is inapposite, as well. The classification at issue did not "classify directly on the basis of mental health." Id. at 231, and defined as "indirect" an action whose burden is not directed at all members of a suspect class, and whose burdened group is not comprised only of the suspect class. Id. at 231-32. Here, however, a statutory provision operates directly upon family decision making, rather than, as in Wilson, upon a completely different choice or status [footnote cont'd]

The other category of cases in which this Court has applied minimal scrutiny in the social welfare context is cases in which eligibility for benefits has been tied to marital status. See Bowen v. Owen, No. 84-1905 (May 19, 1986); Califano v. Jobst, 434 U.S. 47 (1977); Mathews v. De Castro, 429 U.S. 181 (1976). The right to enter into, or dissolve, a marriage is fundamental, see Zablocki 434 U.S. at 383-86; Boddie v. Connecticut, 401 U.S. 371 (1971). This does not mean, however, that marital status can never be used as a proxy for such things as dependency status especially when no infringement on the fundamental right to enter into or dissolve a marriage results

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that happens to affect the choice or status in question only partially and non-disparately. See id. at 233 ("[T]his record certainly presents no statistical support for a contention that the mentally ill as a class are burdened disproportionately to any other class affected by the classification.").

> Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families.

Jobst, 434 U.S. at 53. Similarly,

> [d]ivorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means that they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married.

De Castro, 429 U.S. at 188. In neither Jobst nor De Castro was there any indication that the use of marital status as a proxy induced people to marry or not, or to divorce or not.

The presumption deployed here, however, is completely different. It does not merely use family relationships as a proxy for a valid governmental classification imposing no more than an indirect "tax" on a status or

decision. Instead, it acts directly upon family relations, creating, and unvoidably requiring family members to choose between, conflicting family loyalties and interests.

In addition, the presumption that children receiving child support for their sole benefit (and the parents administering the support payments) spend a hefty share of it on other children actually runs counter to the legal expectations rightfully held by the provider of support and the legal obligations imposed upon the custodial parent. "When an order of support is entered by a court, it is reasonable to assume compliance occurred." Matthews v. Lucas, 427 U.S. 495, 514 (1976). The family interest in question, therefore, does not merely serve as a passive and easy "proxy" for a factor not accorded heightened scrutiny. Family interests are themselves directly affected here in a manner that they are not in the Jobst line of

cases. These cases are therefore inapposite to the analysis required here.

Thus, unlike the statutes involved in any of the cases relied upon by the appellants, the child support "attachment" at issue here both directly and substantially interferes with family decisions and burdens family rights.[4/] The cases employing only

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[4/] The other cases cited by the appellants in support of their contention that only minimal scrutiny need be employed, see U.S. Br. at 43 n.16; State Br. at 10, are wholly inapplicable to this case. None involves either the burdening of a fundamental right or the use of a suspect classification. The Court in Mathews v. Lucas, 427 U.S. 495, "disagree[d]" that "legislation treating legitimate and illegitimate offspring differently is constitutionally suspect," id. at 504 (citation, footnotes omitted), and noted that it "does not interfere in any way with familial relations." Id. at n.8 (emphasis added).

Similarly, Califano v. Aznavorian, 439 U.S. 170 (1978), presented no infringement on a fundamental right. The freedom of international travel at issue in Aznavorian has not yet been recognized by the Court as a fundamental right, but rather as only a "liberty interest," id. at 176, not entitled to the same heightened scrutiny accorded a fundamental right.

Schweiker v. Hogan, 457 U.S. 569 (1982), is utterly inapposite. Not only was no fundamental right implicated, but there was no suggestion that a suspect classification was involved. The appellees themselves challenged the statute only on rationality grounds. [footnote cont'd]

minimal scrutiny, therefore, are entirely inapplicable here. Heightened scrutiny must be applied in this case.

Id. at 588.

IV. THE STATUTE IS IRRATIONAL.

Because the statute directly and substantially burdens fundamental family interests, it must be subjected to heightened scrutiny. Even under minimal scrutiny, however, the statute cannot withstand constitutional challenge: It is utterly irrational.

This irrationality can most readily be seen by using the "simplified example" supplied by the federal appellant. See U.S. Br. at 10-11, 14-15. Assume a family of four, consisting of three children and one parent, and assume that one of the children receives child support payments in the amount of $200 per month.

Prior to the 1984 amendment, the family could have excluded that child from the filing unit; the filing unit would then have consisted of one parent and two children, with no income, "and it would have received

the maximum AFDC benefit for a family of that size, perhaps $250. Thus, when the excluded child's separate income was added in, the aggregate monthly income of all members of the family would have been $450." Id. at 11.

The concept of the family's "aggregate income," as employed by appellant, is misleading: The child receiving child support is entitled to its exclusive use; thus in the federal government's "simplified example" the more proper summary would be that, before the 1984 amendment, the child receiving support payments would be exclusively entitled to a $200 per month level of subsistence, while the remaining three family members would have income available to them of $250 in the aggregate, or approximately $83 each.

As appellant then observes, under the 1984 amendment, if the family applies for AFDC, the child receiving child support must

be included in the filing unit. "It is now a filing unit of four (one parent and three children) with a [nominal] monthly income of $200," U.S. Br. at 11; only $50 is allowed to pass to the family. "Under the amended statute, . . . that $50 would be disregarded in determining the family's income for AFDC purposes; and the family would be treated as a filing unit of four with no income, entitling it to $300 in monthly benefits." Id. at 14-15.

Hence, the family as an aggregate now receives income totaling $350 -- $300 of which come in the form of AFDC benefits -- as compared to pre-1984 when it would have received $450 in income, only $250 in the form of public assistance. Thus, the statute has increased the family's dependency on public assistance (both in absolute and percentage

terms), while reducing its income. 5/ The state's net welfare load has therefore increased, as well, except to the extent that it can collect from absent parents; as discussed supra, the statute itself makes such parents less forthcoming with support payments.

Looking at the incomes of individual family members, rather than at the aggregate, one finds that where formerly three family members received incomes of approximately $83 each and the child supported by the non-custodial parent received an income of $200, under the 1984 amendment all family members now receive approximately $87 each month. Thus, the effect of the statute is to maintain AFDC payments for the remainder of the family at essentially the same level, but to require a child receiving support payments

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5/ This "simplified example" is quite realistic. See Baldwin v. Ledbetter, 647 F.Supp. at 626-27.

from a parent to relinquish to the state somewhat more than half of his or her prior income; the remainder must come from the state and not from the parent.

As the district court observed, "Historically, public policymakers have seen the enforcement of child support obligations as essential to keeping children off welfare. . . . Here the angry [parents] do not abandon their children to welfare; they see children they are supporting conscripted into the welfare system." Gilliard v. Kirk, 633 F. Supp. at 1560.

The federal appellant offers two rationales for this rather bizzare goal. "The purpose of this provision," appellant asserts, "was to relieve the deserted mother of the burden of enforcing the abandoning father's child-support obligations, and to transfer that burden to the states with their greater resources and better collection tech-

niques." U.S. Br. at 12-13. "If a mother decides to apply for AFDC benefits, that decision . . . removes from her shoulders and from the shoulders of her child most of the consequences of child-support delinquency." Id. at 38. A noted, however, in return for "removing from the shoulders of the child" the vicissitudes of support arrangements with the child's actual parent,[6/] the 1984 amendment merely maintains AFDC payments to the siblings at essentially the same level as before the amendment while slashing to a small fraction of the original amount the income formerly received by the child entitled to child support.

6/ It is not clear why the "greater resources and better collection techniques" of the states cannot be employed on the child's behalf without the child surrendering to the state virtually all of the support payment. If that were the only way to invoke the legal mechanisms requiring child support, then "child support" payments would really be nothing but a tax imposed on non-custodial parents, a minor portion of which would be paid out by the state as welfare payments to the child.

This might be justified if the state were offering the child lower but certain benefits for giving up the uncertainty of whether the non-custodial parent will "pay up." In fact, however, the statute still requires the child to bear this risk: The state pays the family its $50 of child support funds only when it actually collects such funds from the absent parent. The child still must wait to see if the non-custodial parent will make good on the support obligation; now, however, if the parent does pay, the state will keep the bulk of the money.

Most importantly, however, the statute achieves exactly the opposite of what appellants claim it does. Before the 1984 amendment, the custodial parent could elect to assign the child support to the state in return for including the child in question in the AFDC filing unit. This bargain would make sense to the custodial parent and child

if the non-custodial parent rarely or never made the support payments. Thus, even before the enactment of the 1984 amendment, every family that would ostensibly benefit under appellant's argument was afforded exactly the protection appellant invokes to justify the 1984 amendment.

The 1984 provision, however, made assignment mandatory if the other children in the household were to be eligible for any AFDC assistance. This requires children who would not have volunteered under the previous arrangement -- those whose absent parents actually were already fulfilling their support obligations -- to assign their payments. "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." Parham v. J.R., 442 U.S. 584, 603 (1979) (emphasis in original).

Any child who does not receive his or her rightful support payment plainly surrenders nothing by assigning that payment to the state. The only children and families who suffer the marked decrease in income discussed above are those whose absent parent actually pays the child support the parent is supposed to pay. These are precisely the children who do not need the state's assistance in collecting from their parents -- but they are the only ones "assisted" by the 1984 amendment. As the district court observed first-hand, the (predictable) result of such an arrangement is to discourage payment by the only parents who, without the 1984 amendment, were making them. Gilliard v. Kirk, 663 F. Supp. at 1535-43.

In United States Department of Agriculture v. Moreno, 413 U.S. 528, this Court held unconstitutional, as "wholly without any rational basis," a provision that

"in practical operation . . . exclude[d] from participation in the food stamp program, not those persons who are 'likely to abuse the program,' but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." Id. at 538 (emphasis in original).

Here, the statute, in practical operation, burdens not those children whose parents do not meet their obligations, but, rather, only children whose parents do, but who live with siblings so desperately in need of aid that they cannot realistically refuse to sign away their parent's support so that their siblings can attain eligibility. This statute, too, then, is "wholly without any rational basis."

Since the clear effect of the 1984 amendments, especially when contrasted with

the optional assignment provision it replaced, is actually to penalize those parents who make and those children who receive child support payments, and since it has no effect on parents and children who do not, the statute cannot rationally be justified as a measure promoting the fulfilling of child support obligations.

Appellant therefore offers a second rationale for the statute asserting that:

> Congress decided in 1984 to ensure "that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole" [citation omitted]. . . . It reasonably concluded that closely-related family members who reside together are likely to share the expenses of common necessities and should be regarded as a single family unit.

U.S. Br. at 20. This reasoning reveals several flaws, however. First, the income of the child receiving child support is by def-

inition not available to the other children; to allocate it as appellant suggests would violate the rights of the child and interests of the non-custodial, supporting parent. This legal restriction on its use clearly distinguishes support payments from all other forms of income.

Second, while Congress might reasonably conclude that closely related family members living together share their expenses, if not their incomes, the structure of AFDC benefits already takes into account the economies the family achieves by sharing expenses. Larger families can generally live together with lower average overhead than can smaller families, because some of the expenses of living are shared so that additional family members do not impose as large a marginal cost on the family:

This common sense economic principle of scale economy is already taken into account,

then, in the formula for calculating AFDC payments. To the extent that families living together share expenses, so that a family of four realizes economies of scale over a family of three, the government has, since long before the 1984 amendment, structured AFDC benefits accordingly.

If Congress' true concern were with allowing three members of a family to receive benefits at a higher rate than appropriate because they benefit from the presence of a fourth consumer in the household, Congress already had the means to deal with this problem at its disposal: include in the filing unit, for purposes of calculating the benefit level for the family, the child receiving support payments -- i.e., four members in the "simplified example" instead of only three -- but withhold a pro rata share (one-fourth) for that child who rightfully chooses to retain separate child

support income and not receive AFDC benefits. In that way, Congress could have reduced the payments to the three beneficiaries in our example from $250 per month ($83 each) to $225 per month ($75 each), thus taking account of the already established per-person savings that accrue from the actual, larger family unit.

The 1984 amendment, then, does not simply take account of shared living expenses. It "attaches" child support payments as a condition of AFDC eligibility for the other family members and retains for the state amounts larger than necessary to account for shared expenses. This rationale, then, is unsupported at best, pretextual at worst.

In sum, this statute is wholly irrational. As a means for adjusting AFDC payments for the savings that accrue to family members for sharing living expenses it irrationally seeks to attach most of the legally separate

income of the child receiving support payments. As a program for encouraging the payment and collection of child support, it takes money only from those families who are successful at collecting child support without governmental interference, reduces the incomes of the families in aggregate and the children individually who do receive such support, and discourages those parents who made good on their obligations. It would have been hard to have drawn the statute any more irrationally; it cannot withstand constitutional scrutiny.

CONCLUSION

For the foregoing reasoning the judgment of the district court should be affirmed.

Respectfully submitted,

Joan E. Bertin,
Counsel of Record
John A. Powell
Lucy Billings
American Civil
Liberties Union
132 West 43rd Street
New York, NY 10036
(212) 944-9800

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